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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

LUKE ARMOUR,
Petitioner,

v.

K.D.G. AND T.S.G.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Nebraska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a state statute that allows the adoption of a child born out of wedlock and the automatic termination of the biological father's parental rights if the father fails to file court action to claim paternity and custody within thirty days of giving notice of his intention to do so deprive such a father of his Fourteenth Amendment rights to due process and equal protection?

II. Did the Nebraska Supreme Court deprive Petitioner of his rights to procedural and substantive due process by holding that he lacked standing to challenge the procedural errors committed by the trial court in the adoption proceedings for his daughter?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Nebraska Supreme Court and their attorneys of record include the following:

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Biological father of Baby Girl Huffman

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Though notified of the appeal, the State of Nebraska neither entered an appearance nor participated in the the appeal.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Luke Armour respectfully petitions this Honorable Court for a writ of certiorari to review the decision of the Nebraska Supreme Court in *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001). Petitioner requests a review of the Nebraska Supreme Court's Opinion affirming the lower court's termination of his parental rights by operation of law. Although the lower court conducted no hearing regarding the merits of terminating Mr. Armour's parental rights, the Nebraska Supreme Court determined that the lower court's action in applying the Nebraska adoption statutes did not violate his Constitutional rights to substantive due process, procedural due process, and equal protection.

OPINIONS AND ORDERS BELOW

The unpublished memorandum order of the Nebraska Supreme Court filed December 12, 2001, which denied Mr. Armour's Motion for Rehearing, appears as Appendix A hereto. The Opinion of the Nebraska Supreme Court filed November 2, 2001, in *In re Adoption of Baby Girl H.*, is published at 262 Neb. 775, 635 N.W.2d 256 (2001), and appears as Appendix B hereto.

The unpublished Decree of Adoption filed September 21, 2000, rendered by the County Court of Gosper County, Nebraska, appears as Appendix C hereto. The unpublished Order filed September 19, 2000 by the County Court of Gosper County, Nebraska, appears as Appendix D hereto. The previous decision

of the Nebraska Supreme Court in *Armour v. L.H.* is published at 259 Neb. 138, 608 N.W.2d 599 (2000), and appears at Appendix E hereto.

JURISDICTIONAL STATEMENT

Respondents K.D.G. and T.S.G., the prospective adoptive parents of Baby Girl Huffman, originally made Petitioner Luke Armour a party to the adoption action they instituted in the County Court of Gosper County, Nebraska. K.D.G. and T.S.G. served Mr. Armour with a Motion for a Determination of Notice Pursuant to NEB. REV. STAT. § 43-104.05 and Notice of Hearing. Mr. Armour participated in the hearing on the Motion on September 15, 2000.

Thereafter, the County Court ruled Petitioner was not entitled to any further notice in the adoption proceedings. *See* Appendix D. The County Court conducted further proceedings regarding the Petition for Adoption in Mr. Armour's absence without any notice to Petitioner. The County Court rendered a Decree of Adoption on September 21, 2000, which granted the Petition for Adoption. *See* Appendix C.

Mr. Armour timely appealed from the final orders of the County Court to the Nebraska Court of Appeals pursuant to NEB. REV. STAT. § 43-112, which states in pertinent part:

> An appeal shall be allowed from any final order, judgment, or decree, rendered under the authority of sections 43-101 to 43-115, from the county court to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals.

> An appeal may be taken by any party and may also be taken by any person against whom the final judgment or final order may be made or who may be affected thereby....

NEB. REV. STAT. § 43-112. The Nebraska Supreme Court took jurisdiction of the appeal.[1]

Following the filing of briefs and oral argument before the Nebraska Supreme Court, that court rendered an Opinion filed November 2, 2001, in *In re Adoption of Baby Girl H.*, 262 Neb. 775 (2001), which appears as Appendix B hereto. The Nebraska Supreme Court's Opinion affirmed the decisions of the County Court of Gosper County, Nebraska, overruled Mr. Armour's assignments of error, and refused to consider some of Petitioner's assignments of error.

Mr. Armour timely filed a Motion for Rehearing in the Nebraska Supreme Court, pursuant to Rule 13 of the Nebraska Rules of Practice and Procedure in the Supreme Court and Court of Appeals. That Rule permits the filing of a motion for rehearing within 10 days after the release of a Nebraska Supreme Court opinion. The Nebraska Supreme Court denied Mr. Armour's Motion for Rehearing in an unpublished memorandum order filed December 12, 2001, which appears as Appendix A hereto.

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[1] The State Supreme Court removed the case from the Nebraska Court of Appeals for decision by the Nebraska Supreme Court before a final decision had been made on the case by the Court of Appeals, pursuant to its authority under NEB. REV. STAT. § 24-1106(3).

The United States Supreme Court has jurisdiction to review the decision of the Nebraska Supreme Court, the court of last resort in Nebraska, on a writ of certiorari in accordance with 28 U.S.C. § 1257.

Because this case involved the constitutionality of Nebraska state statutes, Mr. Armour served a separate written notice to the Nebraska Attorney General on March 7, 2001. That notice advised the Nebraska Attorney General that the appeal before the Nebraska Supreme Court involved questions regarding the federal and state constitutionality of several enumerated Nebraska Statutes. Consequently, certification to the Attorney General under 28 U.S.C. § 2403(b) may be appropriate in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS–

UNITED STATES CONST. AMEND XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEB. REV. STAT. § 43-104.02 provides:

> [A] person claiming to be the father of the [prospective adoptee] child and who intends to claim paternity and obtain custody of the child shall file with the biological

> father registry maintained by the Department... on forms provided by the department, within five business days after the birth of the child, or within five business days after receipt of the notice contemplated in section 43-104.12, or within five business days after the last date of any published notice..., whichever is later, a notice of intent to claim paternity and obtain custody.

NEB. REV. STAT. § 43-104.05 (Reissue of 1998), states in pertinent part:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within thirty days after filing the notice, file a petition in the court in the county where such child is a resident for an adjudication of the claim of paternity and right to custody. *If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court.*

(Emphasis added). See also Appendix F for the full text of the pertinent Nebraska adoption statutes.

STATEMENT OF THE CASE

Petitioner Luke Armour is the biological father of Baby Girl Huffman. *See* Bill of Exceptions from the trial court, Record on Appeal to Nebraska Supreme Court at 58:21; 52:19-20; 23:20 &

24:1. Mr. Armour had a relationship with Lauretta Huffman (21:19), although they never married (22:3). The relationship included sexual intimacy between Mr. Armour and Lauretta Huffman during 1997 (21:20), which resulted in Lauretta Huffman's pregnancy and subsequent birth of Baby Girl Huffman on July 22, 1998 (E11, 1:25, Vol. II).

On July 31, 1998, Lutheran Family Services mailed a notification letter to Mr. Armour in an attempt to comply with NEB. REV. STAT. § 43-104.12 (E5, 1:9 & 10, Vol. II). The letter advised Petitioner of the baby's birth and Lauretta Huffman's plan to relinquish the child for adoption (E11, 1:25, Vol. II). When Petitioner received the letter, he was 18 years old (27:2) and was an unemancipated minor under Nebraska law (28:5). NEB. REV. STAT. § 43-2101 (age of majority 19). Within five days after his receipt of the letter from Lutheran Family Services, Mr. Armour complied with NEB. REV. STAT. § 43-104.02 by filing a Notice of Intent to Claim Paternity and Obtain Custody (E1, 1 & 2:9 & 10, Vol. II) with the Nebraska Department of Health and Human Services (NDHHS) on August 4, 1998 (27:3). Mr. Armour filed a Petition for Determination of Paternity and Custody of the minor child in District Court of Gosper County, Nebraska, on August 21, 1998 (E9, 2:19 & 20, Vol. II). At that time, Mr. Armour acknowledged liability for contribution to the support and education of the child, acknowledged liability for contribution to the pregnancy-related medical expenses of the mother, and requested custody of the minor child (E9, 2-3:19 & 20, Vol. II).

On September 23, 1998, Mr. Armour asked the District Court of Gosper County, Nebraska, to grant visitation with his minor child (E9, 24:19 & 20, Vol. II). Mr. Armour also acknowledged his paternity of the child (E9, 2:19 & 20, Vol. II). On November 13,

1998, the District Court of Gosper County, Nebraska, sustained a demurrer to Mr. Armour's petition and dismissed the case for lack of subject matter jurisdiction (E9, 29:19 & 20, Vol. II). On April 7, 2000, the Nebraska Supreme Court affirmed the District Court's dismissal of Mr. Armour's paternity petition for lack of subject matter jurisdiction. *Armour v. L.H.*, 259 Neb. at 145; Appendix E.[2]

Lauretta Huffman placed the child in the physical custody of Respondents seven days after the child's birth on July 29, 1998 (59:2). On July 31, 1998, Huffman called Mr. Armour on the telephone to notify him that she had given birth (E9, 24:19 & 20, Vol. II). At all times, Mr. Armour desired to seek and obtain custody of his child (31:8). Despite Mr. Armour's efforts,

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[2] Nebraska has a two-tiered system of trial courts. The District Court is the state court of general jurisdiction. The County Court has exclusive jurisdiction in certain areas such as adoption and probate matters, and concurrent jurisdiction with the District Court in others. The statute allows a petitioner to file a domestic relations matter in District Court, but permits hearing of such matters in County Court. NEB. REV. STAT. § 25-2740 (2000 Cum. Supp.).

Petitioner filed his case initially in District Court through former counsel. The District Court sustained a demurrer and dismissed for lack of subject matter jurisdiction. The Nebraska Supreme Court affirmed, ruling that the County Court had exclusive jurisdiction to hear paternity cases involving a child whose mother had served the notice of relinquishment or intent to relinquish for adoption pursuant to NEB. REV. STAT. § 43-104.12 - .14. *See* Appx. E1. Petitioner did not challenge the constitutionality of the Nebraska adoption statutes in this initial action. The issue was raised in a petition for rehearing, which was denied. Nebraska holds that a litigant may not simultaneously invoke a statute and challenge its constitutionality. *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000).

Respondents never permitted Mr. Armour to see his daughter at any time after the child's birth (31:14). Respondents kept Mr. Armour's daughter in their custody and control from the time of placement on July 29, 1998, through the date of the adoption hearing on September 21, 2000 (59:4).

This appeal arose from an original adoption action in the County Court of Gosper County, Nebraska. Following the rendition of the Supreme Court's opinion in *Armour v. L.H.*, supra, on April 7, 2000, Respondents filed a Petition for Adoption and a Motion for Determination of Notice Pursuant to NEB. REV. STAT. § 43-104.05 on July 17, 2000 in the County Court (T1). Prior to the filing of the Petition, the County Court ordered that the court's file shall be sealed (T57), so Mr. Armour could not even obtain a copy of the pleadings.

The County Court of Gosper County, Nebraska, conducted a hearing upon Respondents' Motion for Determination of Notice pursuant to NEB. REV. STAT. § 43-104.05 on September 15, 2000. Respondents and Petitioner Mr. Armour presented evidence and oral arguments regarding the Motion. Petitioner's argument included oral objections to the constitutionality of NEB. REV. STAT. § 43-104.05 and the other applicable adoption statutes (49:15 - 50:10). The County Court held that Mr. Armour was not entitled to any further notice in the adoption proceedings (T74). The court subsequently entered a written Order regarding the Motion, filed September 19, 2000 (T11); Appendix D. In its Order, the County Court found that Mr. Armour did not properly file a petition for an adjudication of the claim of paternity and right to custody in accordance with NEB. REV. STAT. § 43-104.05 (T11); Appx. D1. The court also held that because Petitioner had not followed the procedure required by that statute, he was not entitled to any

further notice in the adoption proceedings (T11); Appx. D1.

On September 21, 2000, the County Court conducted a hearing on the Petition for Adoption in Mr. Armour's absence and without giving notice to Mr. Armour. At the adoption hearing, no one appeared, participated, or had the opportunity to be heard except for Respondents. Respondents presented their evidence without opposition, and the court rendered a Decree of Adoption on September 21, 2000 (T76); Appx. C. The Decree terminated Petitioner's parental rights and decreed the adoption of his daughter by Respondents (T76); Appx. at C1-C2. In the Decree, the court entered several findings and decreed that the minor child be adopted by Respondents, with the usual relationship between Respondents and the child of parents and child (T78); Appx. at C2-C3. The Decree terminated Mr. Armour's parental rights (T76). *See* NEB. REV. STAT. § 43-111, Appx. at F24.

Mr. Armour appealed to the Nebraska Supreme Court from the final orders of the County Court of Gosper County, Nebraska, set forth in the County Court's Order filed September 19, 2000, and the Decree of Adoption filed September 21, 2000. Mr. Armour challenged the federal constitutionality of the adoption statutes on their face and as applied to him.[3] The Nebraska Supreme Court was to conduct a review *de novo* on the record of the questions of fact, to reach an independent conclusion as to what

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[3] Mr. Armour raised these issues through the Statement of Errors included in his Brief of Appellant to the Nebraska Supreme Court. Through his briefs and oral argument before the Nebraska Supreme Court, Mr. Armour argued that the Nebraska statutes violated the Constitution's guarantees to substantive due process, procedural due process, and equal protection.

findings were required under the pleadings and all the evidence, without reference to the conclusion reached in the County Court or the fact that there may be some evidence in support thereof. NEB. REV. STAT. § 25-1925. Appeals in adoption proceedings are also reviewed by an appellate court for error appearing on the record. *In re Adoption of Leslie*, 8 Neb. App. 954 (2000). Whether a statute is constitutional is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Friehe v. Schaad*, 249 Neb. 825, 829 (1996).

The Nebraska Supreme Court rendered an Opinion filed November 2, 2001, in *In re Adoption of Baby Girl H.*, 262 Neb. 775 (2001). *See* Appendix B hereto. The court affirmed the decisions of the County Court of Gosper County, Nebraska, overruled Mr. Armour's assignments of error, and refused to consider some of Mr. Armour's assignments of error. The Nebraska Supreme Court refused to consider substantial controlling authority in numerous United States Supreme Court decisions in holding that the Nebraska statutes at issue did not violate due process or equal protection. With regard to Mr. Armour's equal protection argument, the Nebraska Supreme Court only addressed the State's classification of fathers in comparison to the classification of mothers of children born out of wedlock. However, Mr. Armour had argued to the Court that the statutes violated his right to equal protection by differentiating between the class of fathers of children born in wedlock as compared to the class of fathers of children born out of wedlock without any showing by the State of Nebraska that some important or substantial state interest necessitated such a classification.

Mr. Armour timely filed a Motion for Rehearing in the

Nebraska Supreme Court, suggesting that the court had failed to address his argument regarding the violation of his Constitutional right to equal protection of the law and part of his argument regarding the State's deprivation of procedural due process. However, the Nebraska Supreme Court denied Mr. Armour's Motion for Rehearing in an unpublished memorandum order filed December 12, 2001. *See* Appendix A. Mr. Armour now petitions this Honorable Court for a writ of certiorari to permit further review of the Nebraska adoption statutes.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE NEBRASKA SUPREME COURT'S RESOLUTION OF IMPORTANT FEDERAL DUE PROCESS AND EQUAL PROTECTION QUESTIONS IN A MANNER THAT CONFLICTS WITH CONTROLLING UNITED STATES SUPREME COURT PRECEDENT.

A. State Courts Must Protect a Father's Right to Substantive Due Process When the State Seeks to Permit the Adoption of a Child Born Out of Wedlock Without the Father's Consent.

In 1995, the Nebraska Legislature enacted substantial amendments to the then existing laws governing the adoption of minor children born out of wedlock. These new statutes set up a complicated scheme of requirements whereby the parental rights of a father of a child born out of wedlock could ultimately be deemed terminated simply by operation of law, without the requirement of any hearing, any judicial action, any finding of unfitness or

abandonment, or any determination of the best interests of the child.

The new scheme requires the identification of the fathers of children conceived out of wedlock (*see* NEB. REV. STAT. § 3-104.08 to .10). After identifying the father or potential fathers, the statutory scheme mandates that the appropriate person notify the father or potential fathers of the pregnancy or birth, the mother's relinquishment or plan to relinquish the child for adoptive placement, and only some of the potential rights and consequences for the father (*see* NEB. REV. STAT. § 43-104.12 to .17). These notice requirements constituted a new element in the adoption statutes. Following his receipt of the notice, the statutes require a father to take action:

> [A] person claiming to be the father of the child and who intends to claim paternity and obtain custody of the child shall file with the biological father registry maintained by the Department... on forms provided by the department, within five business days after the birth of the child, or within five business days after receipt of the notice contemplated in section 43-104.12, or within five business days after the last date of any published notice..., whichever is later, a notice of intent to claim paternity and obtain custody.

NEB. REV. STAT. § 43-104.02. However, the cornerstone of the new scheme is new NEB. REV. STAT. § 43-104.05 (Reissue of 1998), which states in pertinent part:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within

> thirty days after filing the notice, file a petition in the court in the county where such child is a resident for an adjudication of the claim of paternity and right to custody. *If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court.*

(Emphasis added).

This new statute violates the constitutional rights of biological fathers on its face. Article 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

These provisions guarantee that the State cannot arbitrarily or unreasonably deprive a person of his or her liberty.

The United States Supreme Court has repeatedly held that a biological parent, like Mr. Armour, has a fundamental liberty interest in the care, custody, and management of his child. That interest does not evaporate simply because a natural parent has not been a model parent or because he has lost temporary custody of his child. When the State moves to destroy familial bonds, it must provide the parents with fundamentally fair procedures. *Santosky v. Kramer*, 455 U.S. 745 at 753-754 (1982).

The Nebraska Supreme Court has also acknowledged that "the relationship between parent and child is constitutionally protected." *In re Application of S.R.S. and M.B.S.*, 225 Neb. at 767, quoting *Quilloin v. Walcott*, 434 U.S. 246 (1978). Both the United States and Nebraska Supreme Courts have noted that a distinction exists between a biological parent's blood relationship and an actual relationship of parental responsibility. *See Lehr v. Robertson*, 463 U.S. 248, 260-261 (1983); *Friehe v. Schaad*, 249 Neb. 825, 833 (1996). *Friehe v. Schaad* upheld the constitutionality of the prior Nebraska statute that required a biological father of a child born out of wedlock to file a notice of intent to claim paternity with the Nebraska Department of Social Services. In *Friehe*, the Nebraska Supreme Court relied extensively upon the United States Supreme Court's reasoning in *Lehr v. Robertson*, *supra*. The Nebraska Supreme Court concluded that because the father had not developed a familial bond with the child and had failed to file a notice of intent to claim paternity within five days, his own failure to act deprived him of his potential parental rights. 249 Neb. at 837.

However, Mr. Armour's interests are much stronger than those of the putative fathers in *Friehe* and *Lehr*. Mr. Armour timely filed his notice of intent to claim paternity and seek custody with NDHHS as required by NEB. REV. STAT. § 43-104.02. The question presented by Petitioner's case is whether it is fundamentally unfair for a State to enact a procedure that automatically terminates the parental rights of such a father if he does not take the *additional step* of filing a petition to establish paternity in court within 30 days after filing the notice of intent to claim paternity. Mr. Armour contends that a statute permitting such automatic termination of parental rights is fundamentally unfair.

The Supreme Court noted in *Lehr*:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban*, 441 U.S. [380] at 392 [(1979)], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point, it may be said that he "act[s] as a father toward his children."

463 U.S. at 261 (quoting *Caban*, 441 U.S. at 389, n.7). The Court also stated:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development....

Id. at 262.

In the present case, Mr. Armour certainly did grasp the opportunity and accept responsibility for his daughter's future. He promptly filed a Notice of Intent to Claim Paternity and Obtain Custody with NDHHS on August 4, 1998 (E1, 2:4 & 6, Vol. II 9/15/00), within just a few days of learning of his daughter's birth. He retained counsel to assist him, and promptly filed a Petition for Determination of Paternity and Custody in Gosper County District Court on August 21, 1998 (E9, 2:19 & 20, Vol. II). Mr. Armour acknowledged liability for contribution to the support and education

of the child, acknowledged liability for contribution to the pregnancy-related medical expenses of the mother, and requested custody of the minor child (E9, 2-3:19 & 20, Vol. II). On September 23, 1998, Mr. Armour asked the District Court to grant visitation between him and the minor child (E9, 24:19 & 20, Vol. II). Mr. Armour also acknowledged his paternity of the child (E9, 2:19 & 20, Vol. II). Under the criteria set forth in Lehr, Mr. Armour did all he could do to demonstrate a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child. Therefore, his interest in personal contact with his child acquired substantial protection under the Due Process Clause. However, despite his efforts, Mr. Armour has never been permitted to even see his daughter (31:14). Lauretta Huffman unilaterally placed Mr. Armour's daughter with Respondents on July 29, 1998 (59:2). Lauretta Huffman did not notify Mr. Armour of the baby's birth until she called him on July 31, 1998, (E9, 24:19 & 20, Vol. II), after the date of the placement. At all times, Mr. Armour desired to seek and obtain custody of his child (31:8). Nonetheless, Respondents kept Mr. Armour's daughter in their custody and control from the time of placement on July 29, 1998, through the date of the adoption hearing on September 21, 2000 (59:4).

The Nebraska Supreme Court previously distinguished circumstances where others had impeded a biological father's attempts to form a relationship with his child. In *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759 (1987), the State Supreme Court compared the father of a child born out of wedlock to a divorced or separated noncustodial parent. In that case, the father's contact with the child was diminished as a result of a rift between him and the custodial parent, not due to an aversion to parental responsibilities. *Id.* at 768. The court also noted that for

all but one day of the six-month period before the filing of the adoption petition, the child was in foster care with either an adoption agency or the prospective adoptive parents and beyond the reach or control of the father. *Id.* at 765. The court specifically found that:

> A secret surrender of a child by one parent to an agency that refuses to let the other parent act as a parent to the child cannot result in a finding that the failure to exercise parental duties was willful, intentional, or voluntary.

Id. (Emphasis added). The court held NEB. REV. STAT. § 43-104.02 to be unconstitutional as applied in that case.

These same principles of due process should have been applied by the Nebraska courts to Mr. Armour's petition. Mr. Armour did all that he could do to accept his parental responsibilities. Lauretta Huffman took steps to keep Mr. Armour away from her and from the child. In October, 1997, she moved, and Mr. Armour never saw her again (E9, 24:19 & 20, Vol. II). She did not even inform Mr. Armour of the baby's July 22nd birth until July 31, 1998. Without even seeking confirmation of his paternity, Mr. Armour began to take actions to seek custody of his daughter. Mr. Armour expressed a willingness to quit school, if necessary, to care for his daughter (E9, 23:19 & 20, Vol. II). As in *S.R.S. and M.B.S., supra*, Respondents secreted Mr. Armour's daughter from him at their home and would not give him the opportunity to act as a parent.

Mr. Armour did all he could himself to establish a familial relationship and to act as a father toward his daughter consistent with the Supreme Court's holding in *Lehr, supra* at 261. At that

point, his fundamental liberty interest became entitled to substantial constitutional protection. However, under the short time lines of NEB. REV. STAT. § 43-104.05, a father could not establish very much of a relationship with his child under even the best of circumstances during the maximum 35 days before the statute would terminate his parental rights. Under these circumstances, the County Court's arbitrary application of NEB. REV. STAT. §§ 43-104.05 and .22 to terminate Mr. Armour's liberty interest in establishing a relationship with his daughter and fulfilling his parental role violated the federal Constitutional requirement of due process.

However, the Nebraska Supreme Court departed from its prior reasoning in *S.R.S. and M.B.S.* and abandoned the reasoning set forth in *Lehr*. The Nebraska Supreme Court acknowledged that the Nebraska Legislature had imposed additional requirements upon biological fathers who wanted to form a relationship with their children, by requiring that they not only file a notice of intent to claim paternity and seek custody, but that they also file a petition for the adjudication of their claims. Although the United States Supreme Court in *Lehr* did not condone the second requirement, the Nebraska Supreme Court purportedly relied exclusively upon *Lehr* in upholding the constitutionality of the new statute's additional requirement. Without noting any compelling state interest, the court reasoned that the Nebraska statute offered Mr. Armour the opportunity to file a petition. The court concluded that he had failed to properly grasp that opportunity and thereby forfeited his parental rights. Such reasoning indulged the presumption that Mr. Armour was unfit to be a parent.

The Supreme Court's decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), also casts doubt upon the Nebraska Supreme Court's reasoning. *Stanley* considered the constitutionality of an Illinois

statute that declared the children of an unmarried father to be dependent state wards upon the death of their mother. That statute presumed unmarried fathers to be unfit to have custody of their children without proving unfitness. Under the statute, the nature of the relationship between the parent and child was completely irrelevant. The Court held that the Illinois statute violated due process. 405 U.S. at 656-657.

The statutory scheme that operated to deprive Mr. Armour of his parental rights is similar in several respects to the Illinois scheme struck down in *Stanley*. Under NEB. REV. STAT. § 43-104.05, although Mr. Armour filed the notice of intent to claim paternity, the statute would terminate his parental rights automatically unless he took the affirmative step of filing a petition to adjudicate his claims of paternity and custody within 30 days. The application of the statute to Mr. Armour did not depend in any way upon Mr. Armour's familial relationship with his daughter. Like the statute in *Stanley*, the Nebraska statute seems to presume that if a father such as Mr. Armour does not file a petition within 30 days, he is presumed to be unfit. That statute is arbitrary in its application to the fathers of children born out of wedlock. The statute operates automatically to terminate parental rights without requiring proof of anything for the apparent sake of expediency in freeing children for adoption. As the Court stated in *Stanley*, "It [the State of Illinois] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove." *Id.* at 658.

Likewise, NEB. REV. STAT. § 43-104.05 indulges a presumption in support of the termination of a biological father's rights instead of requiring the State or the prospective adoptive parents to prove anything. It does not provide for any exceptions

or exigent circumstances that might preclude someone from filing a petition within 30 days.

That Nebraska statute is fundamentally unfair to fathers. It automatically terminates the parental rights of any father of a child born out of wedlock, even if a father has had contact with the child, established a familial relationship, and financially supported the child. Such factors are not permitted to be considerations under the statute; the only criterion is whether or not the father has filed a petition to adjudicate his claim of paternity and right to custody within 30 days after filing the notice of intent to claim paternity. NEB. REV. STAT. § 43-104.05 is thus arbitrary and unconstitutional.

B. State Courts Must Protect a Father's Right to Procedural Due Process When the State Seeks to Permit the Adoption of a Child Born Out of Wedlock Without the Father's Consent.

The Constitutional requirements of procedural due process guarantee that at a minimum the permissible deprivation of life, liberty, or property by adjudication must be preceded by notice and opportunity for a hearing appropriate to the nature of the case. The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545 (1965). The Nebraska adoption statutes deprive fathers of such an opportunity.

NEB. REV. STAT. § 43-104.05 requires the father to file his petition in the court in the county where his child is a resident. However, the notice requirements of NEB. REV. STAT. § 43-104.13 fail to make any provision for notice to the father that

would advise him in which of the 93 Nebraska counties his child resides. Appx. at F15-F17. No other adoption statute provides for such notice to the father. Without such a notice provision, one cannot reasonably expect the father to know the county where he should file his petition. That deprives him of a meaningful opportunity to be heard.

NEB. REV. STAT. § 43-104.13 specifies the exact contents of the notice that the agency or the mother's attorney must provide to the father of the child. That statute specifically requires notification of the father's right to file a notice of intent to claim paternity and obtain custody of the child pursuant to § 43-104.02. However, it does not require notice to the father of the five-business-day time limit for filing the notice pursuant to NEB. REV. STAT. § 43-104.02 or of the second requirement to file a petition for adjudication of the claim of paternity and right to custody within 30 days after filing the notice pursuant to NEB. REV. STAT. § 43-104.05.

Most notably, NEB. REV. STAT. § 43-104.13 does not require notice to the father that if he fails to file the notice with NDHHS within five business days or to file the petition within 30 days after filing the notice, parental rights will automatically and arbitrarily be terminated. Absent this notice, fathers will not understand the necessity of prompt action to avoid the loss of parental rights. Without notice of these requirements, the notice to be provided to the father is unreasonable, and NEB. REV. STAT. § 43-104.13 deprives fathers of procedural due process.

Although Mr. Armour filed the required notice of intent to claim paternity, the County Court and the Supreme Court found that he could not receive notice of the hearing on the adoption petition. Because Mr. Armour received no notice, he could not participate

in the adoption hearing. Because he did not participate in the adoption hearing, the Nebraska Supreme Court determined that Mr. Armour lacked standing to challenge the errors committed by the County Court in the adoption proceeding. For instance, the County Court: failed to find that the adoption was for the best interests of the minor child; incorrectly found that the mother had given a valid consent; conducted the adoption hearing more than four weeks after the filing of the Petition; did not require compliance with NEB. REV. STAT. §§ 43-104.08 to 104.16; and did not obtain substitute consent for the father, all in violation of the Nebraska adoption statutes. Because NEB. REV. STAT. § 43-104.05 deprived Mr. Armour of any right to notice of the adoption hearing and opportunity to be heard at the adoption hearing, the statute clearly violated his right to procedural due process.

The Constitution guarantees that Nebraska may not terminate Mr. Armour's parental rights without giving him the opportunity to present evidence regarding his fitness as a parent. *Lehr v. Robertson*, 463 U.S. at 259. The Nebraska Supreme Court completely ignored this fundamental precept, and in so doing, committed constitutional error warranting this Court's review.

C. State Courts Must Protect a Father's Right to Equal Protection of the Law When the State Seeks to Permit the Adoption of a Child Born Out of Wedlock Without the Father's Consent.

The Nebraska adoption statutes deprived Mr. Armour of equal protection of the laws by drawing a distinction between married fathers and unmarried fathers that did not pertain to a substantial or important governmental interest. To deprive Mr. Armour of a fundamental right, the State of Nebraska must show that it has

narrowly tailored its statute only to the extent necessary to effectuate such a substantial state interest. No such interest exists in Mr. Armour's case.

Before the Nebraska Supreme Court, Mr. Armour claimed that the adoption statutes impermissibly drew a distinction between unwed fathers and married fathers that violated the equal protection rights of unmarried fathers. In its Opinion, the Nebraska Supreme Court discussed the issue of equal protection regarding the statutes' disparate treatment of biological mothers and biological fathers in the context of the placement of children for adoption. The court applied an intermediate scrutiny test based upon the gender classification. While the adoption statutes at issue do distinguish between mothers and fathers, the court's Opinion did not address Mr. Armour's claim that the disparate treatment of unwed fathers and married fathers violates the guarantees of the equal protection clause.

Under current Nebraska laws, the adoption of a child conceived during a marriage cannot proceed without the consent of the father, if both parents are living, subject to some exceptions. NEB. REV. STAT. § 43-104(3). However, the adoption of a child conceived out of wedlock, such as Mr. Armour's daughter, can proceed by the automatic termination of the father's parental rights if he fails to file a notice of intent to claim paternity and seek custody and also file a petition to adjudicate his claim of paternity and custody. NEB. REV. STAT. § 43-104.05. This dichotomy between married and unmarried fathers violates the equal protection rights of the fathers of children conceived out of wedlock.

The Nebraska adoption statutes treat the fathers differently if they had not married the child's mother at the time of the child's

birth. NEB. REV. STAT. §§ 43-104.01 - 43-104.24. These notice requirements constituted a new element in the adoption statutes enacted by the Nebraska Legislature during 1995. After an unwed father receives notice that his child's mother has relinquished or intends to relinquish his child for adoptive placement, the statutes require the father to take immediate action:

> [A] person claiming to be the father of the child and who intends to claim paternity and obtain custody of the child shall file with the biological father registry maintained by the Department... on forms provided by the department, within five business days after the birth of the child, or within five business days after receipt of the notice contemplated in section 43-104.12, or within five business days after the last date of any published notice..., whichever is later, a notice of intent to claim paternity and obtain custody.

NEB. REV. STAT. § 43-104.02. The United States Supreme Court upheld a somewhat comparable New York requirement in *Lehr v. Robertson*, 463 U.S. 248, as discussed above. However, the Nebraska Legislature added a second stringent requirement to its adoption laws:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within thirty days after filing the notice, file a petition in the court in the county where such child is a resident for an adjudication of the claim of paternity and right to custody. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child

> shall not be required and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court.

NEB. REV. STAT. § 43-104.05 (Reissue of 1998) [emphasis added].

Under this scheme, an adoption can take place without the consent of an unwed father, if he fails to strictly comply with both statutes: the filing of the notice within five days and the filing of a petition within 30 days thereafter. *See* NEB. REV. STAT. § 43-104.22. No exceptions exist to this rule, and the statutes do not give the County Court judges any discretion. Even if an unwed father strictly complies with NEB. REV. STAT. § 43-104.02, he only earns a fleeting chance to try to try to develop a relationship with the child, since NEB. REV. STAT. § 43-104.22 permits the County Court to consider "any detriment the child would suffer if removed from the custody of persons with whom the child has developed a substantial relationship." *Id.* Under these statutes, the biological father only has about 35 days to attempt to form a relationship with the child before the County Court must make this determination. However, in Mr. Armour's case, the child's mother and Respondents kept his daughter from him, so he had no opportunity to form any relationship with the child.

The issue that the Nebraska Supreme Court did not address is whether or not the Nebraska Legislature can draw the distinction between married fathers and unmarried fathers without violating the guarantee of equal protection. This classification involves a law that limits unwed fathers' fundamental constitutional rights. The Supreme Court has repeatedly held that a biological parent, like Mr. Armour, has a fundamental liberty interest in the care, custody,

and management of his child. Therefore, the laws must withstand a heightened standard of scrutiny to be constitutional.

In *Zablocki v. Redhail*, 434 U.S. 374 (1977), the Supreme Court scrutinized a Wisconsin statute that prohibited residents of that state from marrying without first obtaining a court order of permission, if the resident had minor issue not in his custody for which he had a court-ordered support obligation. A court had decreed the father in that case to be the father of a child born out-of-wedlock. The father could not marry without court permission. The Supreme Court noted that the right to marry is of fundamental importance and scrutinized the classification of parents who did not have custody of their children but who also owed child support. The Court required a "critical examination" of the state interests advanced in support of the classification because the statute significantly interfered with the exercise of a fundamental right. *Id.* at 383. Under this heightened scrutiny analysis, the Court determined that Wisconsin had not closely tailored its statute to only effectuate its interests with the minimal effect on the fundamental right. Therefore, the Court declared the statute unconstitutional as violative of the equal protection clause. *Id.* at 390 - 391.

The Court in *Zablocki* also identified other fundamental liberty interests protected by the Constitution, including: marriage, procreation, contraception, family relationships, child rearing and education, freedom of personal choice in matters of marriage and family life, abortion, and the right to bear children. *Id.* at 385 - 386. Several of these fundamental liberty interests are at stake for Mr. Armour. The State of Nebraska did not enter an appearance, did not file any briefs, and did not even suggest any compelling state interests for the adoption law that distinguishes between married and unmarried fathers. Even so, the State Supreme Court's

Opinion suggests that the statutory scheme serves legitimate state ends of enabling a speedy determination of the rights of the father. Appx. at B11-B12. But in the present case, the statute does not further this end. Mr. Armour had already filed a notice of intent to claim paternity and seek custody. As the court noted, he had also acknowledged his obligation to pay support, filed a motion for visitation, and filed a petition to establish paternity. Appx. at B9-B10. The supposed interest of the State of Nebraska was to apply to fathers who did not take such actions, not to fathers like Mr. Armour.

In *Trimble v. Gordon*, 430 U.S. 762 (1976), the Supreme Court determined that a statute violated the equal protection clause. The state of Illinois only allowed illegitimate children to inherit by intestate succession from their mothers, but not from their fathers. Even applying a lesser intermediate scrutiny to the classification of illegitimacy, the Court found that the classification was not properly related to the alleged state interest of promoting legitimate family relationships. The Court stated: "[T]he equal Protection Clause requires more than the mere incantation of a proper state purpose." *Id.* at 769. The Court rejected the argument that a state might attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.

As in *Trimble*, Nebraska failed to narrowly tailor its classification of all unwed fathers to promote the State's supposed interest. The State of Nebraska is not constitutionally permitted to impose a sanction upon Mr. Armour or his child by making a classification that treats the parent and the child differently simply because Mr. Armour had not married the child's mother.

The constitutional guarantee of equal protection under the law

requires the state to govern impartially, without drawing distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Lehr v. Robertson*, 463 U.S. at 265. If the Court applies a strict scrutiny test to determine if Nebraska has enacted a statute that is necessary and narrowly tailored to further a compelling state interest, the classification based upon the marital status of the father cannot stand. Certiorari is appropriate to review Nebraska's violation of the equal protection clause.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTING DECISIONS AMONG THE STATE COURTS OF LAST RESORT REGARDING THE CONSTITUTIONALITY OF STATE STATUTES THAT PERMIT THE ADOPTION OF CHILDREN BORN OUT OF WEDLOCK WITHOUT PROTECTING THE FATHER'S LIBERTY INTEREST IN FORMING A RELATIONSHIP WITH HIS CHILD.

The Supreme Court last directly addressed the constitutional protections for fathers of children born out of wedlock in adoption cases in *Lehr v. Robertson*, 463 U.S. 248. In the nearly two decades since that decision, many state legislatures such as Nebraska's have responded by amending their adoption statutes. Many of the states' highest courts have interpreted and applied the Court's holding in *Lehr*. With the increasing number of out of wedlock births, the constitutional rights of the fathers of such children have become an important and frequently disputed federal question.

For example, some of the states' high courts have declared state statutes unconstitutional if they purport to allow the adoption

of children without first terminating or addressing the parents' rights. *See, e.g., Nale v. Robertson*, 871 S.W.2d 674 (Tenn. 1994); *In re Adoption of B.G.S.*, 556 So.2d 545 (La. 1990); *Matter of Adoption of Baby Girl S*, 535 N.Y.S.2d 676 (Sur. 1988), *aff'd*, 543 N.Y.S.2d 602; *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987); and *Thorne v. Padgett*, 386 S.E.2d 155 (Ga. 1989).

Other state high courts have upheld the constitutionality of state statutes that permit the adoption of children without the consent of the biological parent. *See, e.g., Swayne v. L.D.S. Social Services*, 795 P.2d 637 (Utah 1990); *Friehe v. Schaad*, 249 Neb. 825 (1996); and *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054 (Ind. 1992).

Since the Supreme Court's opinion in *Lehr*, the state courts' differing interpretations of the application of their adoption laws and notice schemes to fathers of children born out of wedlock has led to inconsistency and uncertainty for fathers. In one state, the high court may protect a father's liberty interest in forming a relationship with his child under the due process and equal protection clauses as interpreted in *Lehr*. In other states, such as Nebraska, the high court may go out of its way to uphold statutes that hinder or deprive a father of his liberty interest in forming a relationship with his child.

Certiorari should be granted to allow the Court to end the speculation and the jurisdictional differences by addressing this issue. *Lehr* upheld a requirement that a father file a postcard if he wanted to assert his parental rights. Nebraska has taken another giant step by requiring all putative fathers to additionally initiate a paternity lawsuit within what amounts to a 30-day statute of limitations window. This greatly exceeds the scope of the *Lehr*

facts and decision. This Court should put the reins on states like Nebraska, that would make fathers jump though hoop after hoop in order to protect already guaranteed fundamental parental rights for the mere sake of expediting the adoptive placement of children who are already wanted by at least one biological parent.

CONCLUSION

For the reasons set forth above, Petitioner Luke Armour respectfully requests that the Court grant his Petition and issue a writ of certiorari to the Nebraska Supreme Court to review that court's decision affirming the orders of the County Court of Gosper County, Nebraska.

Respectfully submitted,

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March 12, 2002

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NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. Box 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

December 12, 2001

Michael J. Synek
814 Central Avenue
Kearney, NE 68847-5930

IN CASE OF: S-00-001104, In re Adoption of Huffman,
Huffman v. Armour

Appellant/Motion for Rehearing & Brf filed 11/13/01

has been reviewed by the court and the following order entered:

Motion of appellant for rehearing overruled.

Respectfully,

/S/

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

In re Adoption of Baby Girl H.;
K.D.G. and *T.S.G., appellees, v.*
Luke Armour, appellant.

No. S-00-1104.

SUPREME COURT OF
NEBRASKA

262 Neb. 775; 635 N.W.2d 256

November 2, 2001, Filed

PRIOR HISTORY:
Appeal from the County Court for Gosper County: Carlton E. Clark, Judge.

DISPOSITION:
Affirmed.

COUNSEL:
Michael J. Synek for appellant.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellees.

JUDGES:
Hendry, C.J., Wright, Connolly, Gerrard, McCormack, and Miller-Lerman, JJ., and Moore, Judge. Stephan, J., not participating.

OPINION:

[260] [*776]**

Connolly, J.

Neb. Rev. Stat. § 43-104.05 (Reissue 1998) requires a putative father to file a petition for adjudication of paternity in county court within 30 days of filing a notice of intent to claim paternity in order to preserve his rights to notice of adoption proceedings. See *Armour v. L.H., 259 Neb. 138, 608 N.W.2d 599 (2000)*. Appellant, Luke Armour, the putative father of Baby Girl H., filed a petition for adjudication of paternity in the **[*777]** district court, which was the wrong court. The district court dismissed the petition for lack of jurisdiction. In the present adoption proceedings, the county court determined that because Armour filed in the wrong court, he had not complied with the provisions of § 43-104.05. As a result, the court determined Armour was not entitled to further notice in adoption proceedings involving the child.

On appeal, Armour argues that the application of the adoption statutes to his case violate his rights to due process and equal protection and that the statutes are facially unconstitutional. We determine that the statutes at issue are constitutional and did not deprive Armour of his constitutional rights as applied. We affirm.

BACKGROUND

On August 3, 1998, Armour received a letter by registered mail from a counselor at Lutheran Family Services. The letter stated that L.H., a person with whom Armour had been sexually active, had given birth to a child on July 22, 1998, and was planning to relinquish the child for adoption. The letter

advised that Armour had been identified as a possible biological father and informed Armour that he could: "a. Deny paternity; b. Waive any paternal rights [Armour] may have; c. Join in the relinquishment and consent to adoption; or d. File a notice of intent to claim paternity and obtain custody of the child." The letter advised Armour that if he wished to establish his rights as the biological father, he must file a notice with the biological father registry maintained at the Nebraska Department of Health and Human Services within 5 days of receipt of the letter. The letter further advised Armour that if he wished to pursue custody of the child, he should seek counsel from an attorney immediately. At the time Armour received the letter, he was an unemancipated minor and was living with his parents.

Armour filled out a form entitled "Notice of Intent to Claim Paternity and Obtain Custody," in which he stated his intention to obtain custody of the child. He further acknowledged his liability for contribution to support the child and pay for pregnancy-related expenses of the mother. The form was faxed to the appropriate department on August 4, 1998. A portion of the notice stated:

> **[*778]** I understand that if a petition is not filed in the county court in the county of residence of said child for an adjudication of my claim of paternity and right to custody within thirty (30) days after the filing of this notice, my consent to the adoption of said child shall not be required and any alleged parental rights of mine shall not be recognized thereafter in any court.

Armour hired legal counsel, and on August 21, 1998, a petition for determination of paternity and custody was filed in district court. The petition named L.H. as a party and stated that it was filed according to § 43-104.05. K.D.G. and T.S.G. sought to

intervene as the prospective adoptive parents. On September 22, L.H. filed a **[**261]** demurrer on the basis that the district court lacked subject-matter jurisdiction, and Armour later filed a motion for visitation pending final hearing.

Without ruling on the petition in intervention or motion for visitation, the district court entered an order dismissing the petition for lack of jurisdiction. We dismissed Armour's appeal, holding that the procedure for adjudicating paternity under § 43-104.05 falls within the exclusive jurisdiction of the county court, or in certain circumstances, the separate juvenile court. *Armour v. L.H., 259 Neb. 138, 608 N.W.2d 599 (2000).* On June 23, 2000, the district court dismissed the petition pursuant to the mandate.

On July 17, 2000, K.D.G. and T.S.G. filed a petition for adoption in the county court. The petition asserted that Armour had been given proper notice of his rights and that he had failed to file a petition for an adjudication of paternity within 30 days of filing notice of intent to claim paternity with the Department of Health and Human Services as required by § 43-104.05. The record shows that Armour was served with a copy of the petition.

K.D.G. and T.S.G. also filed a motion seeking a determination that Armour's consent to the adoption was not required and that he was not entitled to further notice in the proceedings. Armour appeared without counsel and requested a continuance because the attorney he had planned to hire had a conflict of interest. The county court ruled in favor of K.D.G. and T.S.G., but later granted Armour's motion for a rehearing.

At the hearing, Armour testified that L.H. informed him of her pregnancy when she called him in June or July 1998, shortly **[*779]** before she gave birth. Armour contended that

because he was a minor, he received insufficient notice of his rights from Lutheran Family Services. Armour also argued that any action to preclude him from receiving notice of, and participating in, the adoption proceedings would deprive him of procedural and substantive due process under the U.S. and Nebraska Constitutions. Armour then argued that the statutory scheme at issue was unconstitutional.

On September 19, 2000, the county court determined that Armour did not properly file a petition for adjudication of paternity in accordance with § 43-104.05 and was not entitled to any further notice in the adoption proceedings. On September 21, K.D.G. and T.S.G. adopted the child. Armour appeals.

ASSIGNMENTS OF ERROR

Armour assigns, rephrased, that the county court erred in (1) determining that he was not entitled to further notice in the adoption proceedings; (2) determining that he did not have any rights that were required to be recognized in the adoption proceedings; (3) depriving him of his constitutional rights, particularly substantive and procedural due process under the U.S. and Nebraska Constitutions; (4) rendering an adoption decree contrary to statutory provisions; and (5) failing to dismiss the adoption petition for failure of proof and lack of jurisdiction. Armour further assigns that *Neb. Rev. Stat. § § 43-101* to 43-116 (Reissue 1998), especially § § 43-104.05, 43-104.13, and 43-104.22, violate the U.S. and Nebraska Constitutions on their faces.

STANDARD OF REVIEW

[1] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion

independent of the findings of the trial court. *Airport Auth. of Village of Greeley* **[**262]** *v. Dugan, 259 Neb. 860, 612 N.W.2d 913 (2000).*

[2] Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below. *Parnell v. Good Samaritan Health Sys., 260 Neb. 877, 620 N.W.2d 354 (2000); Bergan Mercy Health Sys. v. Haven, 260 Neb. 846, 620 N.W.2d 339 (2000).*

[*780] ANALYSIS

Constitutionality of Adoption Statutes as Applied

Armour contends that the application of the adoption statutes to his case denied him due process. Armour argues that because he filed a notice of intent to claim paternity within 5 days under § 43-104.02, applying § 43-104.05 deprives him of his constitutionally protected interest of parenting his child.

At the time Armour filed his petition for adjudication of paternity in district court, § 43-104.05 provided in part:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within thirty days after filing the notice, file a petition in the court in the county where such child is a resident for an adjudication of the claim of paternity and right to custody. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required and any

> alleged parental rights of the claimant-father shall not be recognized thereafter in any court.

Section 43-104.22 provided:

> The court shall determine that the biological father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:
>
> . . . .
>
> (7) The father failed to timely file a petition to adjudicate his claim of paternity and right to custody as contemplated in section 43-104.05[.]

[3-5] This court has not addressed whether § 43-104.22 can violate due process as applied. The U.S. Supreme Court has long recognized that state intervention in a parent-child relationship is subject to constitutional oversight. See, e.g, *Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).* The Court has held that an established familial relationship is a liberty interest entitled to substantial due process protection. *Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).* But the Court has made clear **[*781]** that "the mere existence of a biological link does not merit equivalent constitutional protection." *463 U.S. at 261.* The Court explained that the protection given to the familial relationship stems from the emotional attachments that derive from the intimacy of daily association. Thus, when a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and opportunity to be heard before a child may be adopted. As the Court explained:

> The significance of the biological connection is that it offers the natural father an opportunity that no other

> male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child **[**263]** relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

463 U.S. at 262.

In *Lehr*, the putative father of a child born out of wedlock never supported the child and failed to enter his name in his state's "putative father registry," *463 U.S. at 251,* which would have entitled him to notice of any adoption proceedings. When the child was over 2 years old, the biological mother and her husband filed a petition for adoption and an order of adoption was entered. The biological father sought to vacate the adoption, arguing that the requirement that he file notice with the putative father registry in order to be given notice of the adoption violated his constitutional rights. The U.S. Supreme Court held that the putative father failed to grasp any opportunity interest he had in raising his child. In reaching this conclusion, the Court stated that it was concerned only with whether the state had adequately protected the putative father's opportunity to form a relationship with his child. The Court held that the putative father registry protected that right and further stated that the possibility that the father failed to use the registry because of his ignorance of the law could not be a sufficient reason for criticizing the law itself.

[*782] In Nebraska, a putative father is required under § 43-104.02 to file a notice of intent to claim paternity within 5 days of either the child's birth or receiving notice from an

agency or attorney of the birth. Under § 43-104.04, if the putative father fails to file such a notice, his consent or relinquishment are not required. Citing to *Lehr*, we held in *Friehe v. Schaad, 249 Neb. 825, 545 N.W.2d 740 (1996)*, that § § 43-104.02 and 43-104.04 did not violate due process as applied.

In *Friehe*, the putative father, after learning of the child's birth, infrequently visited the child at the hospital. The father agreed to place the child in temporary foster care and did not file a notice of intent to claim paternity within the 5-day time period required by § 43-104.05. The putative father argued that § § 43-104.02 and 43-104.04 unconstitutionally violated his rights to due process and equal protection. We noted that the liberty interest at stake did not involve the termination of established custodial rights. Instead, the interest involved was a putative father's opportunity to potentially form a familial bond with his child. We then specifically noted the reasoning of the U.S. Supreme Court in *Lehr* as follows: "'The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.'" *249 Neb. at 836, 545 N.W.2d at 748*, quoting *Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983)*. We held that the putative father had it within his own power to assert his rights and obtain an opportunity to be heard by filing a notice of intent to claim paternity. Because it was his own failure to act upon the notice given to him of the child's birth, we determined that his due process claim was without merit.

Armour did not have an established familial relationship with the child guaranteeing him due process protection. Armour never saw the child and did not assist in paying for the child's birth or in supporting the child. Armour did, however, timely file a notice of intent to claim paternity pursuant to §

43-104.02, in which he acknowledged his obligation to pay support. Armour later failed to timely file a **[**264]** petition for adjudication of paternity under § 43-104.05 because his attorney filed the first petition in the wrong court. A motion for visitation was also filed in the wrong court. The question is whether Armour has sufficiently **[*783]** grasped his opportunity interest in a relationship with his child requiring further notice of adoption proceedings and an opportunity to be heard under the Due Process Clauses of the U.S. and Nebraska Constitutions.

In accordance with *Lehr*, when Armour failed to file a petition for adjudication of paternity under § 43-104.05, Armour and his attorney were presumed to know the law. Indeed, Armour's notice of intent to claim paternity, filed under § 43-104.02, stated that he understood that he must file a petition for adjudication of paternity in the county court within 30 days. That the error of filing in the wrong court was made by Armour's attorney does not change the analysis. As *Lehr* makes clear, the issue is whether the state has adequately protected the putative father's opportunity interest. The failure to properly follow § 43-104.05 because of ignorance of the law can not be a sufficient reason for criticizing the law itself. As we indicated in *Friehe*, Armour is presumptively capable of asserting and protecting his own rights. Further, after our decision in *Armour v. L.H., 259 Neb. 138, 608 N.W.2d 599 (2000),* Armour failed to make any further attempts to comply with § 43-104.05. As a result, Armour failed to ever file a petition for adjudication of paternity in county court. We determine that it was not impossible for Armour to properly comply with § 43-104.05 and that he was not denied any reasonable opportunity to do so. The statutes at issue adequately protected Armour's opportunity to form a relationship with his child. We determine that Armour did not sufficiently grasp his opportunity interest and that the

application of § § 43-104.05 and 43-104.22 to Armour's case did not deprive him of due process.

Facial Constitutionality of § 43-104.05

Armour next contends that the adoption statutes facially violate the U.S. and Nebraska Constitutions. Armour argues that the 30-day filing requirement of § 43-104.05 arbitrarily acts to terminate parental rights in violation of his right to substantive due process.

[6,7] Substantive due process relates to the content of the statute specifying when a right can be lost or impaired. See *Wells v. Children's Aid Soc. of Utah, 681 P.2d 199 (Utah 1984)*. The U.S. Supreme Court has stated that the 14th Amendment **[*784]** forbids the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. See *Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).*

Applying the reasoning of *Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983),* the Utah Supreme Court has held that an adoption statute that required a notice of paternity to be filed in order to preserve parental rights did not facially violate substantive due process. *Wells, supra.* The court in *Wells* reasoned that parental rights are not absolute and that the state has a compelling interest in speedily identifying those persons who will assume a parental role over illegitimate newborn children. The court further noted that for the statute to serve its purpose for the welfare of the child, a determination that a child can be adopted must be final and immediate. *Id.*

[8] We hold that the 30-day filing requirement of § 43-104.05 does not facially violate substantive due process. The

[265]** 30-day requirement does not arbitrarily act to terminate a putative father's parental rights. Rather, the requirement provides the father with a period of time in which to assert his rights. If the father fails to do so, the statute then serves the compelling state interest of immediately placing the child with people who will assume a parental role for the child.

[9] Armour next contends that the adoption statutes--in particular § 43-104.05--facially violate equal protection because the statutes treat biological mothers and fathers differently. Under principles of equal protection, the government may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest. *Lehr, supra.*

We have stated that the 5-day filing requirement of § 43-104.02, although treating mothers and fathers differently, enables a speedy determination of the rights of the father so as to make it possible for the state to achieve a legitimate end, which is the placement of children as soon after birth as possible. *In re Application of S.R.S. and M.B.S., 225 Neb. 759, 408 N.W.2d 272 (1987).* See, also, *Friehe v. Schaad, 249 Neb. 825, 545 N.W.2d* **[*785]** *740 (1996)* (interpreting *In re Application of S.R.S. and M.B.S.* as upholding the facial constitutionality of adoption statutes).

[10] The immediate secure adoption of children is an important state interest. We determine that the adoption statutes serve an important state interest and that any disparity of treatment in those statutes are substantially related to that interest. Accordingly, we determine that the adoption statutes do not facially violate equal protection.

Notice

Armour next contends that § 43-104.13 is facially unconstitutional because it fails to require that notice be given to a putative father that he must file a petition for adjudication of paternity within 30 days. Armour claims that this failure violates principles of procedural due process.

Section 43-104.08 provides:

> Whenever a child is claimed to be born out of wedlock and the biological mother contacts an adoption agency or attorney to relinquish her rights to the child . . . the agency or attorney contacted shall attempt to establish the identity of the biological father and further attempt to inform the biological father of his right to execute a relinquishment and consent to adoption, or a denial of paternity and waiver of rights . . . .

Section 43-104.12 requires that an agency or attorney shall notify by registered mail, return receipt requested, any person who has been identified as the biological father or possible biological father by the child's mother. Section 43-104.13 provides a list of information and rights of which a possible biological father must be notified.

[11] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Benitez v. Rasmussen, 261 Neb. 806, 626 N.W.2d 209 (2001).*

[12] Although § 43-104.13 does not require that a putative father be given notice that he must file a petition for adjudication within 30 days of filing his notice of intent to claim paternity, **[*786]** § 43-104.13 does advise the father to seek legal counsel immediately if he desires to seek custody of his child. Further, § 43-104.05 provides notice **[**266]** that a petition for adjudication must be filed within 30 days of the date the notice of intent to claim paternity was filed. If § 43-104.05 is followed, the father is afforded full notice of the adoption proceedings and an opportunity to be heard. It was not the content of the adoption statutes that deprived Armour of notice in the adoption proceedings. Instead, Armour's own failure to properly follow statutory procedure deprived him of notice in the adoption proceedings. We determine that § 43-104.13 is facially constitutional.

Armour next contends that the requirements of the notice statute, § 43-104.13, were not met. The letter Armour received from Lutheran Family Services was sent by registered mail with a return receipt requested. The letter informed Armour of his rights as set forth in § 43-104.13. Having reviewed the letter, we determine that it was sent in compliance with the notice statutes.

Armour next contends that the notice requirements of § 43-104.13 deprived him of due process and equal protection because Armour was a minor when he received notice of the child's birth. The stated purpose of § 43-104.13 is to provide notice to allow compliance with § 43-104.02. That section requires a putative father to file a notice of intent to claim paternity in order to preserve his rights. Armour received notice of the birth and acted on that notice by filing a notice of intent to claim paternity pursuant to § 43-104.02. Therefore, Armour was not deprived of any benefit intended by the statute. Nothing in the notice statutes requires notice to be

served on the parents of a minor. Armour does not cite to any precedent for his argument that § 43-104.02 as applied to him violated his rights to due process or equal protection, nor can we find any precedent to support his argument. We conclude that this assignment of error is without merit.

Remaining Assignments of Error

Armour assigns that the district court erred in entering a decree of adoption based on what he contends were errors made by the court in the final adoption hearing and decree. K.D.G. and T.S.G. argue that Armour lacks standing to raise these issues.

[*787] [13] In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties. *Miller v. City of Omaha, 260 Neb. 507, 618 N.W.2d 628 (2000); In re Interest of Alycia P., 258 Neb. 258, 603 N.W.2d 7 (1999).* The issues regarding the final adoption hearing and decree arose out of proceedings that Armour was not a party to and was not required to be given notice of. Armour is attempting to assert the legal interests of third parties. Because Armour lacks standing, we do not address his remaining assignments of error.

CONCLUSION

We determine that the adoption statutes at issue are not unconstitutional, either facially or as applied to Armour. We further conclude that the district court did not err in determining that Armour was not entitled to further notice in the adoption proceedings for Baby Girl H. We do not address Armour's remaining assignments of error due to Armour's lack of standing to assert the errors. Accordingly, we affirm.

Affirmed.

Stephan, J., not participating.

C1

IN THE COUNTY COURT OF
GOSPER COUNTY, NEBRASKA

IN THE MATTER OF THE ADOPTION	)	CASE NO.
	)	AD00-2
of BABY GIRL HUFFMAN	)	DECREE OF
	)	ADOPTION

On the 21st day of September, 2000, this matter came on for hearing before the undersigned judge upon the petition of [redacted] and [redacted], husband and wife, for the adoption of Baby Girl Huffman, a minor child born in Benkelman, Dundy County, Nebraska on July 22, 1998. The petitioners and the minor child were present in court. The petitioners were represented by their attorney, Sally A. Rasmussen. Evidence was adduced and the matter was submitted to the court.

THE COURT, BEING DULY ADVISED IN THE PREMISES, FINDS AS FOLLOWS:

1. The allegations stated in the petition for adoption are true.

2. The petitioners and the minor child are residents of [redacted]County, Nebraska.

3. The minor child has resided with the petitioners for a period of time in excess of six months immediately preceding the filing of the petition for adoption.

4. Pursuant to NEB. REV. STAT. § 43-104.05 and the order of this court filed herein on September 19, 2000, the biological father's consent to adoption is not required, he

is not entitled to notice, and any alleged parental rights of the biological father shall not be recognized by this court in this proceeding.

5. The biological mother of the minor child executed a valid consent and relinquishment for adoption. Prior to relinquishing her parental rights, the biological mother was presented a nonconsent form and executed an affidavit in relation thereto. Said affidavit was received into evidence on this date.

6. The name of the minor child should be changed from "Baby Girl Huffman" to [redacted].

7. A criminal history record information check has been conducted by the Nebraska State Patrol, and the results have been filed with the court.

8. A central register check has been conducted by the Nebraska Department of Health and Human Services, and the results have been filed with the court.

9. An adoptive home study has been completed by Lutheran Family Services and filed with the court.

10. The medical history and report of adoption have been properly completed and filed with the court.

11. The petitioners have compiled with all applicable provisions of NEB.REV.STAT. § 43-104.08 to § 43-104.16.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

A. The adoption of Baby Girl Huffman by the petitioners, [redacted] and [redacted] is hereby decreed.

B. The petitioners and the minor child shall hereafter sustain toward each other the usual relation of parent and child, and all rights, duties and other legal consequences of the natural relation of parent and child shall thereafter exist between the minor child and the petitioners and their kindred.

C. The minor child shall hereafter be known by and bear the name of [redacted].

DATED this 21st day of September, 2000.

BY THE COURT:

_____/S/_____
Carlton Clark, County Court Judge

Prepared by:

Sally A. Rasmussen, #19019
Attorney for Petitioners
Mousel, Garner & Rasmussen
101 West C Street
McCook, Nebraska 69001
(308) 345-1600

D1

IN THE COUNTY COURT OF GOSPER COUNTY, NEBRASKA

IN THE MATTER OF THE ADOPTION	) CASE NO.
	) AD00-2
of BABY GIRL HUFFMAN	)
	) ORDER

On the 15th day of September, 2000, this matter came on for a rehearing before the undersigned judge upon the petitioners' motion for a determination of notice pursuant to NEB. REV. STAT. § 43-104.05. The petitioners were not present in court but were represented by their attorney, Sally A. Rasmussen. The biological father, Luke Armour, was present in court and was represented by his attorney, Michael Synek. Evidence was adduced and the matter was argued and submitted.

The court, being duly advised in the premises, finds that Luke Armour did not properly file a petition for an adjudication of the claim of paternity and right to custody in accordance with NEB. REV. STAT. § 43-104.05. Because the proper procedure was not followed, Luke Armour is not entitled to any further notice in these adoption proceedings.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. Pursuant to NEB. REV. STAT. § 43-104.05., Luke Armour is not entitled to any further notice in these adoption proceedings.

2. The court file in this case shall remain sealed pursuant to the court's order of July 13, 2000.

BY THE COURT:

____/s/_____
Carlton Clark, County Court Judge

Prepared by:

Sally A. Rasmussen, #19019
Attorney for Petitioners
Mousel, Garner & Rasmussen
101 West C Street
McCook, Nebraska 69001
(308) 345-1600

Luke Armour, appellant, v. L.H., appellee.

No. S-98-1232.

SUPREME COURT OF NEBRASKA

259 Neb. 138; 608 N.W.2d 599

April 7, 2000, Filed

PRIOR HISTORY:
Appeal from the District Court for Gosper County: John J. Battershell, Judge.

DISPOSITION:
Appeal dismissed.

COUNSEL:
Robert E. Wheeler for appellant.

Susan K. Sapp, of Cline, Williams, Johnson, Wright & Oldfather, for appellee.

Sally A. Rasmussen, of Mousel, Garner & Rasmussen, for K.D.G. and T.S.G.

JUDGES:
Hendry, C.J., Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ. Wright, J., not participating.

OPINION:

[*139] [**601]

Stephan, J.

Luke Armour appeals from an order of the district court for Gosper County, Nebraska, dismissing his petition filed pursuant to Neb. Rev. Stat. § 43-104.05 (Reissue 1998) by which he sought an adjudication of paternity and custody of a child born out of wedlock. We agree with the determination of the district court that it lacked subject matter jurisdiction and, therefore, conclude that the appeal must be dismissed.

BACKGROUND

In his petition filed August 21, 1998, Armour specifically alleged that this action was brought "for adjudication of claim of paternity and right of custody pursuant to Neb. Rev. Stat. § 43-104.05." He alleged that he is a resident of Arcadia, Nebraska, and that in the fall of 1997, he had sexual intercourse with L.H., who became pregnant and gave birth to a female infant on July 22, 1998. Armour alleged that he first learned of the possibility that he might be the father of the child from a telephone call he received from L.H. in late June 1998. Armour further alleged that upon being notified by Lutheran Family Services of the birth of the child and his right to claim paternity and custody, he filed a "Notice of Intent to Claim Paternity and Obtain Custody" with the Nebraska Department of Health and Human Services (DHHS) on August 4, 1998. Armour further alleged in his petition that if he is found to be the father of the child, he "acknowledges liability for contribution to the support and education of the child and for contribution to the pregnancy-

related medical expenses of the mother" and further assumed liability for genetic testing with respect to the determination of paternity. He alleged that if paternity is established, he desires custody of the child; that he is a fit and proper person to have custody; and that placing the child in his custody would be in the child's best interests. In the prayer of his petition, Armour sought a temporary visitation order, genetic testing to determine paternity, adjudication of paternity and right to custody, and appointment of a guardian ad litem for the child. The petition concluded with a request "that this matter be heard by the District Court Judge."

In response to the petition, L.H. filed a demurrer asserting that the district court lacked subject matter jurisdiction. On October 2, [*140] 1998, K.D.G and T.S.G. filed a "Motion for Leave to Intervene, or in the Alternative, Motion for Leave To Be Joined as Parties Defendant and Notice of Hearing." In this motion, K.D.G. and T.S.G. alleged that they are the "prospective adoptive parents" of the child, who had been in their care and custody since July 29, 1998. They alleged that if permitted to intervene, they would file a demurrer attached to the motion, which asserted a lack of subject matter jurisdiction, the incapacity of the parties, and the failure to state facts sufficient to constitute a cause of action.

On October 6, 1998, the district court conducted a telephonic hearing in which counsel for Armour, L.H., and K.D.G. and [**602] T.S.G. appeared and participated. The court heard argument on the demurrer of L.H. and took the matter under advisement. In an order filed November 16, the district court determined that it lacked subject matter jurisdiction and therefore sustained the demurrer of L.H., made no ruling on K.D.G and T.S.G.'s motion for leave to

intervene, and dismissed the action. The court reasoned that the petition on its face sought to invoke jurisdiction under § 43-104.05, which the court determined to be a part of the Nebraska statutes dealing with adoption over which the county courts and separate juvenile courts have exclusive jurisdiction. Armour perfected this appeal, which we moved to our docket pursuant to our responsibility to regulate the caseloads of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Armour assigns that the district court erred in holding that it did not have jurisdiction over the action.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999).

ANALYSIS

[2] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as [*141] alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Neb. Against Exp. Gmblg.*

v. Neb. Horsemen's Assn., 258 Neb. 690, 605 N.W.2d 803 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000). Thus, in reviewing the order of the district court sustaining the demurrer and dismissing the action, we must assume the truth of Armour's allegations that he may be the biological father of a child born out of wedlock; that he received notice of the birth of the child and his right to claim paternity and custody; and that upon receipt of such notice, he filed a notice of intent to claim paternity and custody with DHHS.

[3,4] In seeking an adjudication of paternity, Armour specifically invokes § 43-104.05. The issue of law which we must decide is whether this is a general action for paternity, over which the district court has subject matter jurisdiction or, as the district court determined, an adoption matter over which either a county court or a separate juvenile court has exclusive original jurisdiction. See Neb. Rev. Stat. § 24-517(10) (Cum. Supp. 1998). In resolving this question, we are guided by familiar principles of statutory construction. The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999). In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999).

Section 43-104.05 is included within chapter 43, article 1, of the Nebraska Revised Statutes, which is entitled

"Adoption Procedures" and encompasses Neb. Rev. Stat. § § 43-101 through 43-165 (Reissue 1998). Section 43-101 provides that "except as otherwise provided in the Nebraska Indian Child Welfare Act, any minor child may be adopted by any adult person ... subject to the rules prescribed in sections 43-101 to [*142] 43-115 ...." Prior to [**603] July 1, 1998, county courts in Nebraska had "exclusive original jurisdiction in all matters of adoption." § 24-517(9) (Supp. 1997). Effective July 1, 1998, § 24-517 was amended to provide that county courts had "exclusive original jurisdiction in matters of adoption, except if a separate juvenile court already has jurisdiction over the child to be adopted, concurrent original jurisdiction with the separate juvenile court." § 24-517(10) (Cum. Supp. 1998).

With the exception of § 43-104.07, §§ 43-104.01 through 43-104.24 deal specifically with children born out of wedlock. Section 43-104.09 requires that "in all cases of adoption of a minor child born out of wedlock," the biological mother, or if she is under the age of 19 the agency or attorney representing her, must execute an affidavit identifying the biological father or persons who are possible biological fathers, or must state specific reasons why she is unable or unwilling to do so. Persons so identified are entitled to written notice advising them of the pregnancy or birth and anticipated relinquishment for adoption and certain other information, including the right of the biological father to file a notice of intent to claim paternity and obtain custody of the child. See §§ 43-104.12 and 43-104.13. Such notice of intent must be filed in the biological father registry, established and maintained by DHHS pursuant to § 43-104.01, within specified timeframes from the date of notice or the birth of the child, whichever is later. § 43-104.02.

When Armour's petition was filed on August 21, 1998, § 43-104.05 provided:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within thirty days after filing the notice, file a petition in the court in the county where such child is a resident for an adjudication of the claim of paternity and right to custody. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court. After the filing of such petition, [*143] the court shall set a hearing date upon proper notice to the parties not less than ten nor more than twenty days after such filing. If the mother contests the claim of paternity, the court shall take such testimony as shall enable it to determine the facts. The claimant-father's rights and the custody of the child shall be determined pursuant to section 43-104.22. The court shall appoint a guardian ad litem to represent the best interests of the child.

We note that prior to July 1, 1998, § 43-104.05 (Cum. Supp. 1996) provided that a petition for seeking adjudication of paternity filed pursuant thereto was to be filed "in the county court in the county where such child is a resident." This language was amended to that contained in the statute at the time of Armour's filing by the same 1998 legislation which conferred concurrent original jurisdiction over

adoption matters to a separate juvenile court having custody of the child to be adopted. See 1998 Neb. Laws, L.B. 1041. In this same legislation, the Legislature also conferred concurrent jurisdiction upon the county, district, and separate juvenile courts with respect to "paternity determinations" which were defined as "proceedings to establish the paternity of a child under sections 43-1411 to 43-1418." Neb. Rev. Stat. § 25-2740(1)(b) (Cum. Supp. 1998). See, also, § 24-517(7). In 1999, the Legislature amended § 43-104.05 to provide that a petition for adjudication of paternity filed pursuant thereto must be filed "in the county court in the county where such child was born or, if a separate juvenile court already has jurisdiction over the child, in such separate juvenile court." § 43-104.05 (Supp. 1999). See, also, 1999 Neb. Laws, L.B. 594. [**604]

[5] Although Armour characterizes § 43-104.05 as "part of the adoption statutes concerning the rights of fathers," he argues that it is merely a statute of limitations which "requires that the claimant-father file [an] action to determine his claim of paternity within 30 days of filing the notice claiming paternity, or lose recognition of his rights." Brief for appellant at 6. Notably, Armour's petition does not invoke Neb. Rev. Stat. § 43-1411 (Reissue 1998), which provides in pertinent part:

> A civil proceeding to establish the paternity of a child may be instituted, in the court of the district where the child is domiciled or found ... by (1) the mother or the [*144] alleged father of such child, either during pregnancy or within four years after the child's birth, *unless consent or relinquishment has*

> *been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption ....*

(Emphasis supplied.) There is obvious tension between this statutory language and Armour's theory that § 43-104.05 is a statute of limitations applicable to all paternity actions over which the district court has jurisdiction. Were this so, a biological father of a child born out of wedlock would have 4 years in which to commence an action to establish his paternity unless he filed a notice of intent to do so with the biological father registry, in which case the limitations period would be shortened to 30 days from the date of such filing. In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998). We can conceive of no reason why the Legislature would create a procedure whereby the general statute of limitations applicable to paternity actions would be drastically shortened by a biological father's stated intent to bring such an action. Moreover, the last quoted clause of § 43-1411(1) clearly contemplates a different procedure for adjudicating paternity of a child when the biological mother has either consented to or relinquished the child for adoption.

[6] We conclude that § 43-104.05 was intended by the Legislature to constitute such a procedure. Section 43-104.05 specifically requires that "the claimant-father's rights and the custody of the child shall be determined pursuant to section 43-104.22." Section 43-104.22 in turn provides that "at any hearing to determine a biological father's parental rights to the child, the court shall receive evidence with regard to the biological father's actual paternity of the child and whether he is a fit, proper, and suitable custodial parent for the child."

Section 43-104.22 further authorizes the court to determine that the biological father's consent is not required for a valid adoption of the child upon a finding of one or more of eight factors, which include the failure to timely file a notice of intent to claim paternity and obtain custody pursuant to § 43-104.02 and the failure [*145] "to timely file a petition to adjudicate his claim of paternity and right to custody as contemplated in section 43-104.05." § 43-104.22(7). The procedure for adjudicating paternity set forth in § 43-104.05 is thus an integral part of the statutory mechanism for the adoption of a child born out of wedlock and is therefore a matter of adoption which falls within the exclusive jurisdiction of the county court or, under certain circumstances, a separate juvenile court. Accordingly, the district courts lack subject matter jurisdiction over a petition to adjudicate paternity brought pursuant to § 43-104.05.

CONCLUSION

[7] Based upon our independent review, we conclude that a petition to adjudicate paternity filed pursuant to § 43-104.05 is a matter of adoption over which the district courts have no subject matter jurisdiction and that, therefore, the district court in the present case did not err in sustaining the demurrer and dismissing [**605] the action. When a lower court does not have jurisdiction over the case before it, an appellate court also lacks jurisdiction to review the merits of the claim. *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999). Accordingly, we dismiss the appeal.

Appeal dismissed.

Wright, J., not participating.

CHAPTER 43. INFANTS AND JUVENILES
ARTICLE 1. ADOPTION PROCEDURES
(a) GENERAL PROVISIONS

R.R.S. Neb. § 43-101 (2001)

§ 43-101. Children eligible for adoption

(1) Except as otherwise provided in the Nebraska Indian Child Welfare Act, any minor child may be adopted by any adult person or persons and any adult child may be adopted by the spouse of such child's parent in the cases and subject to sections 43-101 to 43-115, except that no person having a husband or wife may adopt a minor child unless the husband or wife joins in the petition therefor. If the husband or wife so joins in the petition therefor, the adoption shall be by them jointly, except that an adult husband or wife may adopt a child of the other spouse whether born in or out of wedlock.

HISTORY: Laws 1943, c. 104, § 1, p. 349; R.S.1943, § 43-101; Laws 1984, LB 510, § 1; Laws 1985, LB 255, § 17; Laws 1999, LB 594, § 8.

R.R.S. Neb. § 43-102 (2001)

§ 43-102. Petition requirements; decree; adoptive home study, when required; jurisdiction; filings

Except as otherwise provided in the Nebraska Indian Child Welfare Act, any person or persons desiring to adopt a minor child or an adult child shall file a petition for adoption signed and sworn to by the person or persons desiring to adopt. The consent or

consents required by sections 43-104 and 43-105 or section 43-104.07, the documents required by section 43-104.07 or the documents required by sections 43-104.08 to 43-104.24, and a completed preplacement adoptive home study if required by section 43-107 shall be filed prior to the hearing required in section 43-103.

The county court of the county in which the person or persons desiring to adopt the child reside has jurisdiction of adoption proceedings, except that if a separate juvenile court already has jurisdiction over the child to be adopted under the Nebraska Juvenile Code, such separate juvenile court has concurrent jurisdiction with the county court in such adoption proceeding. The petition and all other court filings for an adoption proceeding shall be filed with the clerk of the county court. The party shall state in the petition whether such party requests that the proceeding be heard by the county court or, in cases in which a separate juvenile court already has jurisdiction over the child to be adopted under the Nebraska Juvenile Code, such separate juvenile court. Such proceeding is considered a county court proceeding even if heard by a separate juvenile court judge and an order of the separate juvenile court in such adoption proceeding has the force and effect of a county court order. The testimony in an adoption proceeding heard before a separate juvenile court judge shall be preserved as in any other separate juvenile court proceeding. The clerks of the district courts shall transfer all adoption petitions and other adoption filings which were filed with such clerks prior to August 28, 1999, to the clerk of the county court where the separate juvenile court which heard the proceeding is situated. The clerk of such county court shall file and docket such petitions and other filings.

Except as set out in subdivisions (1)(b)(ii), (iii), (iv), and (v) of section 43-107, an adoption decree shall not be issued until at least six months after an adoptive home study has been completed by the department or a licensed child placement agency.

HISTORY: Laws 1943, c. 104, § 2, p. 349; R.S.1943, § 43-102; Laws 1975, LB 224, § 1; Laws 1983, LB 146, § 1; Laws 1984, LB 510, § 2; Laws 1985, LB 255, § 18; Laws 1993, LB 16, § 1; Laws 1995, LB 712, § 19; Laws 1996, LB 1001, § 1; Laws 1998, LB 1041, § 6; Laws 1999, LB 375, § 2; Laws 1999, LB 594, § 9.

R.R.S. Neb. § 43-103 (2001)

§ 43-103. Petition; hearing; notice

Except as otherwise provided in the Nebraska Indian Child Welfare Act, upon the filing of such petition the court shall fix a time for hearing the same, not less than four weeks nor more than eight weeks after the filing of such petition. The court may require notice of the hearing to be given to the child, if over fourteen years of age, to the natural parent or parents of the child, and to such other interested persons as the judge may, in the exercise of discretion, deem advisable, in the manner provided for service of a summons in a civil action. If the judge directs notice by publication, such notice shall be published three successive weeks in a legal newspaper of general circulation in such county.

HISTORY: Laws 1943, c. 104, § 3, p. 349; R.S.1943, § 43-103; Laws 1983, LB 447, § 50; Laws 1985, LB 255, § 19.

R.R.S. Neb. § 43-104 (2001)

§ 43-104. Adoption; consent required; exceptions

Except as otherwise provided in the Nebraska Indian Child Welfare Act, no adoption shall be decreed unless written consents thereto are filed in the court of the county in which the person or persons desiring to adopt reside and the written consents are executed by (1) the minor child, if over fourteen years of age, or the adult child, (2) any district court, county court, or separate juvenile court in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court, county court, or separate juvenile court in the State of Nebraska or by virtue of section 43-1203, and (3) both parents of a child born in lawful wedlock if living, the surviving parent of a child born in lawful wedlock, the mother of a child born out of wedlock, or both the mother and father of a child born out of wedlock as determined pursuant to sections 43-104.08 to 43-104.24, except that consent shall not be required of any parent who (a) has relinquished the child for adoption by a written instrument, (b) has abandoned the child for at least six months next preceding the filing of the adoption petition, (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

HISTORY: Laws 1943, c. 104, § 4(1), p. 350; R.S.1943, § 43-104; Laws 1951, c. 127, § 1, p. 546; Laws 1967, c. 248, § 1, p. 652; Laws 1971, LB 329, § 1; Laws 1973, LB 436, § 1; Laws 1975, LB 224, § 2; Laws 1983, LB 146, § 3; Laws 1984, LB 510, § 3; Laws 1985, LB 255, § 20; Laws 1988, LB 790, § 22; Laws 1995, LB 712, § 20; Laws 1996, LB 1296, § 19; Laws 1998, LB 1041, § 7; Laws 1999, LB 594, § 10.

R.R.S. Neb. § 43-104.01 (2001)

§ 43-104.01. Child born out of wedlock; biological father registry; Department of Health and Human Services Finance and Support; duties

(1) The Department of Health and Human Services Finance and Support shall establish a biological father registry which shall record the names and addresses of (a) any person adjudicated by a court of this state to be the father of a child born out of wedlock if a certified copy of the court order is filed with the registry by such person or any other person, (b) any person who has filed with the registry, prior to notification under sections 43-104.12 to 43-104.16, a paternity claim for notification purposes for such child, (c) any person who has filed with the registry a notice of intent to claim paternity and obtain custody of such child, and (d) any person adjudicated by a court of another state or territory of the United States to be the father of such child, if a certified copy of the court order has been filed with the registry by that person or any other person.

(2) A paternity claim for notification purposes or a notice of intent to claim paternity and obtain custody filed with the registry shall include the claimant's name and address, the name and last-known address of the mother, and the month and year of the birth or the expected birth of the child. The person filing the notice shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department.

(3) Any person filing a paternity claim for notification purposes or a notice of intent to claim paternity and obtain custody with the biological father registry may revoke such notice, and upon receipt

of such revocation by the registry, the effect shall be as if no filing had ever been made.

(4) The department shall not divulge the names and addresses of persons listed with the registry to any other person except as authorized by law or upon order of a court for good cause shown.

(5) The department may develop information about the registry and may distribute such information, through their existing publications, to the news media and the public. The department may provide information about the registry to the Department of Correctional Services, the Department of Health and Human Services, and the Department of Health and Human Services Regulation and Licensure, who may distribute such information through their existing publications.

HISTORY: Laws 1995, LB 712, § 21; Laws 1996, LB 1044, § 105; Laws 1999, LB 594, § 11.

R.R.S. Neb. § 43-104.02 (2001)

§ 43-104.02. Child born out of wedlock; paternity claim; filing requirements

As provided in section 43-104.01, a person claiming to be the father of the child and who intends to claim paternity and obtain custody of the child shall file with the biological father registry maintained by the Department of Health and Human Services Finance and Support on forms provided by the department, within five business days after the birth of the child, or within five business days after receipt of the notice contemplated in section 43-104.12, or within five business days after the last date of any published

notice provided pursuant to section 43-104.14, whichever is later, a notice of intent to claim paternity and obtain custody. Such notice shall include the social security number of the person claiming to be the father. A notice of intent to claim paternity and obtain custody of the child shall be considered to have been filed if it is received by the Department of Health and Human Services Finance and Support or postmarked prior to the end of the fifth business day contemplated in this section.

HISTORY: Laws 1975, LB 224, § 3; Laws 1995, LB 712, § 22; Laws 1996, LB 1044, § 106; Laws 1997, LB 752, § 97.

R.R.S. Neb. § 43-104.03 (2001)

§ 43-104.03. Child born out of wedlock; paternity claim; notice; to whom given; effect

Within three days after the filing of a paternity claim for notification purposes or a notice of intent to claim paternity and obtain custody with the biological father registry pursuant to sections 43-104.01 and 43-104.02, the Director of Finance and Support shall cause a certified copy of such notice to be mailed by certified mail to (1) the mother or prospective mother of such child at the last-known address shown on the notice or (2) an agent specifically designated in writing by the mother or prospective mother to receive such notice. The notice shall be admissible in any action for paternity, shall estop the claimant from denying paternity of such child thereafter, and shall contain language that the claimant acknowledges liability for contribution to the support and education of the child after birth and for contribution to the pregnancy-related medical expenses of the mother.

HISTORY: Laws 1975, LB 224, § 4; Laws 1994, LB 1224, § 49; Laws 1995, LB 712, § 23; Laws 1996, LB 1044, § 107; Laws 1999, LB 594, § 12.

R.R.S. Neb. § 43-104.04 (2001)

§ 43-104.04. Child born out of wedlock; paternity claim; failure to file notice; effect

If a notice of intent to claim paternity and obtain custody is not timely filed with the biological father registry pursuant to section 43-104.02, the mother of a child born out of wedlock or an agent specifically designated in writing by the mother may request, and the Department of Health and Human Services Finance and Support shall supply, a certificate that no notice of intent to claim paternity and obtain custody has been filed with the biological father registry and the filing of such certificate pursuant to section 43-102 shall eliminate the need or necessity of a consent or relinquishment for adoption by the natural father of such child.

HISTORY: Laws 1975, LB 224, § 5; Laws 1995, LB 712, § 24; Laws 1996, LB 1044, § 108; Laws 1999, LB 594, § 13.

R.R.S. Neb. § 43-104.05 (2001)

§ 43-104.05. Child born out of wedlock; paternity claim; notice; filed; petition for adjudication of paternity; trial; guardian ad litem

If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within thirty days after filing

the notice, file a petition for an adjudication of the claim of paternity and right to custody. The petition shall be filed in the county court in the county where such child was born or, if a separate juvenile court already has jurisdiction over the child, in such separate juvenile court. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required, he is not entitled to any further notice, and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court. After the filing of such petition, the court shall set a trial date upon proper notice to the parties not less than twenty nor more than thirty days after such filing. If the mother contests the claim of paternity, the court shall take such testimony as shall enable it to determine the facts. The claimant-father's rights and the custody of the child shall be determined pursuant to section 43-104.22. The court shall appoint a guardian ad litem to represent the best interests of the child.

HISTORY: Laws 1975, LB 224, § 6; Laws 1995, LB 712, § 25; Laws

R.R.S. Neb. § 43-104.09 (2001)

§ 43-104.09. Child born out of wedlock; biological mother; affidavit; form

In all cases of adoption of a minor child born out of wedlock, the biological mother shall complete and sign an affidavit in writing and under oath. The affidavit shall be executed by the biological mother before or at the time of execution of the consent or relinquishment and shall be attached as an exhibit to any petition to finalize the adoption. If the biological mother is under the age of nineteen, the affidavit may be executed by the agency or attorney

representing the biological mother based upon information provided by the biological mother. The affidavit shall be in substantially the following form:

AFFIDAVIT OF IDENTIFICATION

I, ..., the mother of a child, state under oath or affirm as follows:

(1) My child was born, or is expected to be born, on the ..... day of ....., ..., at ....., in the State of .....

(2) I reside at ....., in the City or Village of ....., County of....., State of .....

(3) I am of the age of ..... years, and my date of birth is .....

(4) I acknowledge that I have been asked to identify the father of my child.

(5) (CHOOSE ONE)

(5A) I know and am identifying the biological father (or possible biological fathers) as follows:

The name of the biological father is ..... His last-known home address is ..... His last-known work address is ..... . He is ..... years of age, or he is deceased, having died on or about the ..... day of

....., ..., at ....., in the State of .....

(For other possible biological fathers, please use additional sheets of paper as needed.)

(5B) I am unwilling or unable to identify the biological father (or possible biological fathers). I do not wish or I am unable to name the biological father of the child for the following reasons:

..... Conception of my child occurred as a result of sexual assault or incest

..... Providing notice to the biological father of my child would threaten my safety or the safety of my child

..... Other reason: .....

(6) If the biological mother is unable to name the biological father, the physical description of the biological father (or possible biological fathers) and other information which may assist in identifying him, including the city or county and state where conception occurred:

.....

.....

(use additional sheets of paper as needed).

(7) Under penalty of perjury, the undersigned certifies that the statements set forth in this affidavit are true and correct.

(8) I have read this affidavit and have had the opportunity to review and question it. It was explained to me by ..... . I am signing it as my free and voluntary act and understand the contents and the effect of signing it.

Dated this ..... day of ....., ...
(Acknowledgment) .....
(Signature)

HISTORY: Laws 1995, LB 712, § 2.

R.R.S. Neb. § 43-104.10 (2001)

§ 43-104.10. Child born out of wedlock; agency or attorney; duty to inform biological mother

The agency or attorney representing the biological mother shall inform the mother of the legal and medical need to determine, whenever possible, the paternity of the child prior to an adoption and that her failure or refusal to accurately identify the biological father or possible biological fathers could threaten the legal validity of any adoptive placement of the child.

HISTORY: Laws 1995, LB 712, § 3.

R.R.S. Neb. § 43-104.11 (2001)

§ 43-104.11. Child born out of wedlock; father's relinquishment and consent; when effective

If the biological mother's affidavit, required by section 43-104.09, identifies only one possible biological father of the child and states that there are no other possible biological fathers of the child, and if the named father executes a valid relinquishment and consent to adoption of the child in the form mandated by section 43-106 or executes a denial of paternity and waiver of rights in the form mandated by section 43-106, the court may enter a decree of

adoption pursuant to section 43-109 without regard to sections 43-104.12 to 43-104.16. A named biological father's relinquishment and consent or a named biological father's waiver of rights is irrevocable upon signing and is not voidable for any period after signing. Such relinquishment and consent or such waiver of rights may only be challenged on the basis of fraud or duress for up to six months after signing.

HISTORY: Laws 1995, LB 712, § 4; Laws 1999, LB 594, § 15.

R.R.S. Neb. § 43-104.12 (2001)

§ 43-104.12. Child born out of wedlock; agency or attorney; duty to inform biological father

In order to attempt to inform the biological father or possible biological fathers of the right to execute a relinquishment and consent to adoption or a denial of paternity and waiver of rights, the agency or attorney representing the biological mother shall notify, by registered or certified mail, restricted delivery, return receipt requested:

(1) Any person adjudicated by a court in this state or by a court in another state or territory of the United States to be the biological father of the child;

(2) Any person who has filed a paternity claim for notification purposes or a notice of intent to claim paternity and obtain custody pursuant to sections 43-104.01 and 43-104.02;

(3) Any person who is recorded on the child's birth certificate as the child's father;

(4) Any person who might be the biological father of the child who was openly living with the child's biological mother within the twelve months prior to the birth of the child;

(5) Any person who has been identified as the biological father or possible biological father of the child by the child's biological mother pursuant to section 43-104.09;

(6) Any person who was married to the child's biological mother within six months prior to the birth of the child and prior to the execution of the relinquishment; and

(7) Any other person who the agency or attorney representing the biological mother may have reason to believe may be the biological father of the child.

HISTORY: Laws 1995, LB 712, § 5; Laws 1999, LB 594, § 16.

R.R.S. Neb. § 43-104.13 (2001)

§ 43-104.13. Child born out of wedlock; notice to biological father; contents

The notice sent by the agency or attorney pursuant to section 43-104.12 shall be served sufficiently in advance of the birth of the child, whenever possible, to allow compliance with section 43-104.02 and shall state:

(1) The biological mother's name, the fact that she is pregnant or has given birth to the child, and the expected or actual date of delivery;

(2) That the child has been relinquished by the biological mother, that she intends to execute a relinquishment, or that the biological mother has joined or plans to join in a petition for adoption to be filed by her husband;

(3) That the person being notified has been identified as a possible biological father of the child;

(4) That the possible biological father may have certain rights with respect to such child if he is in fact the biological father;

(5) That the possible biological father has the right to (a) deny paternity, (b) waive any parental rights he may have, (c) relinquish and consent to adoption of the child, or (d) file a notice of intent to claim paternity and obtain custody of the child pursuant to section 43-104.02;

(6) That to deny paternity, to waive his parental rights, or to relinquish and consent to the adoption, the biological father must contact the undersigned agency or attorney representing the biological mother, and that if he wishes to seek custody of the child he should seek legal counsel from his own attorney immediately; and

(7) That if he is the biological father and if the child is not relinquished for adoption, he has a duty to contribute to the support and education of the child and to the pregnancy-related expenses of the mother and a right to seek visitation.

The agency or attorney representing the biological mother may enclose with the notice a document which is an admission or denial of paternity and a waiver of rights by the biological father,

which the biological father may choose to complete, in the form mandated by section 43-106, and return to the agency or attorney.

HISTORY: Laws 1995, LB 712, § 6.

R.R.S. Neb. § 43-104.14 (2001)

§ 43-104.14. Child born out of wedlock; agency or attorney; duty to notify biological father by publication; when

(1) If the agency or attorney representing the biological mother is unable through reasonable efforts to locate and serve notice on the biological father or possible biological fathers as contemplated in sections 43-104.12 and 43-104.13, the agency or attorney shall notify the biological father or possible biological fathers by publication.

(2) The publication shall be made once a week for three consecutive weeks in a legal newspaper of general circulation in the Nebraska county or county of another state which is most likely to provide actual notice to the biological father. The publication shall include:

(a) The first name or initials of the father or possible father or the entry "John Doe, real name unknown", if applicable;

(b) A description of the father or possible father if his first name is or initials are unknown;

(c) The approximate date of conception of the child and the city and state in which conception occurred, if known;

(d) The date of birth or expected birth of the child;

(e) That he has been identified as the biological father or possible biological father of a child whom the biological mother currently intends to place for adoption and the approximate date that placement will occur;

(f) That he has the right to (i) deny paternity, (ii) waive any parental rights he may have, (iii) relinquish and consent to adoption of the child, or (iv) file a notice of intent to claim paternity and obtain custody of the child within five business days of the birth of the child or within five business days of this notice, whichever is later, pursuant to section 43-104.02; and

(g) That (i) in order to deny paternity, waive his parental rights, relinquish and consent to the adoption, or receive additional information to determine whether he is the father of the child in question, he must contact the undersigned agency or attorney representing the biological mother and (ii) if he wishes to seek custody of the child, he must seek legal counsel from his own attorney immediately.

HISTORY: Laws 1995, LB 712, § 7.

R.R.S. Neb. § 43-104.15 (2001)

§ 43-104.15. Child born out of wedlock; notification to biological father; exceptions

The notification procedure set forth in sections 43-104.12 to 43-104.14 shall, whenever possible, be completed prior to a child being placed in an adoptive home. If the information provided in the

biological mother's affidavit prepared pursuant to section 43-104.09 presents clear evidence that providing notice to a biological father or possible biological father as contemplated in sections 43-104.12 to 43-104.14 would be likely to threaten the safety of the biological mother or the child or that conception was the result of sexual assault or incest, notice is not required to be given. If the biological father or possible biological fathers are not given actual or constructive notice prior to the time of placement, the agency or attorney shall give the adoptive parents a statement of legal risk indicating the legal status of the biological father's parental rights as of the time of placement, and the adoptive parents shall sign a statement of legal risk acknowledging their acceptance of the placement, notwithstanding the legal risk.

HISTORY: Laws 1995, LB 712, § 8.

R.R.S. Neb. § 43-104.16 (2001)

§ 43-104.16. Child born out of wedlock; notice requirements; affidavit by agency or attorney

In all cases involving the adoption of a minor child born out of wedlock, the agency or attorney representing the biological mother shall execute an affidavit stating that due diligence was used to identify and give actual or constructive notice to the biological father or possible biological fathers of the child and stating the methods used to attempt to identify and give actual or constructive notice to those persons or the reason why no attempts were made to identify and notify those persons. The affidavit shall be attached to any petition filed in an adoption proceeding.

HISTORY: Laws 1995, LB 712, § 9.

R.R.S. Neb. § 43-104.17 (2001)

§ 43-104.17. Child born out of wedlock; petition; evidence of compliance required; notice to biological father; when

In all cases of adoption of a minor child born out of wedlock, the petition to finalize the adoption shall specifically allege compliance with sections 43-104.08 to 43-104.16, and shall attach as exhibits all documents which are evidence of such compliance. No notice of the filing of the petition to finalize or the hearing on the petition shall be given to a biological father or possible biological father who (1) executed a valid relinquishment and consent or a valid denial of paternity and waiver of rights pursuant to section 43-104.11 or (2) was provided notice under sections 43-104.12 to 43-104.14 and failed to timely file an intent to claim paternity and obtain custody pursuant to section 43-104.02.

HISTORY: Laws 1995, LB 712, § 10.

R.R.S. Neb. § 43-104.18 (2001)

§ 43-104.18. Child born out of wedlock; failure to establish compliance with notice requirements; court powers; guardian ad litem authorized

If a petition to finalize an adoption is filed and fails to establish substantial compliance with sections 43-104.08 to 43-104.16, the court shall receive evidence by affidavit of the facts and circumstances of the biological mother's relationship with the biological father or possible biological fathers at the time of conception of the child and at the time of the biological mother's

relinquishment of the child, including any evidence that providing notice to a biological father would be likely to threaten the safety of the biological mother or the child or that the conception was the result of sexual assault or incest. If, under the facts and circumstances presented, the court finds that the agency or attorney representing the biological mother did not exercise due diligence in complying with sections 43-104.08 to 43-104.16, or if the court finds that there is no credible evidence that providing notice to a biological father would be likely to threaten the safety of the biological mother or the child or that the conception was the result of sexual assault or incest, the court shall order the attorney or agency to exercise due diligence in complying with sections 43-104.08 to 43-104.16. If the attorney or agency fails to exercise due diligence in complying with such sections or at any time upon the petition or application of any interested party the court may appoint a guardian ad litem to represent the interests of the biological father. The guardian ad litem shall be chosen from a qualified pool of local attorneys. The guardian ad litem shall receive reasonable compensation for the representation, the amount to be determined at the discretion of the court.

HISTORY: Laws 1995, LB 712, § 11.

R.R.S. Neb. § 43-104.22 (2001)

§ 43-104.22. Child born out of wedlock; hearing; paternity of child; father's consent required; when; determination of custody

At any hearing to determine a biological father's parental rights to the child, the court shall receive evidence with regard to the biological father's actual paternity of the child and whether he is a fit, proper, and suitable custodial parent for the child. The court

shall determine that the biological father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:

(1) The father abandoned or neglected the child after having knowledge of the child's birth;

(2) The father is not a fit, proper, and suitable custodial parent for the child;

(3) The father had knowledge of the child's birth and failed to provide reasonable financial support for the mother or child;

(4) The father abandoned the mother without reasonable cause and with knowledge of the pregnancy;

(5) The father had knowledge of the pregnancy and failed to provide reasonable support for the mother during the pregnancy;

(6) The child was conceived as a result of a nonconsensual sex act or an incestual act;

(7) Notice was provided pursuant to sections 43-104.12 to 43-104.14 and the father failed to timely file an intent to claim paternity and obtain custody pursuant to section 43-104.02;

(8) The father failed to timely file a petition to adjudicate his claim of paternity and right to custody as contemplated in section 43-104.05; or

(9) The man is not, in fact, the biological father of the child.

The court shall determine the custody of the child according to the best interest of the child, weighing the superior rights of a biological parent who has been found to be a fit, proper, and suitable parent against any detriment the child would suffer if removed from the custody of persons with whom the child has developed a substantial relationship.

HISTORY: Laws 1995, LB 712, § 15; Laws 1999, LB 594, § 17.

R.R.S. Neb. § 43-109 (2001)

§ 43-109. Decree; conditions; content

(1) If, upon the hearing, the court finds that such adoption is for the best interests of such minor child or such adult child, a decree of adoption shall be entered. No decree of adoption shall be entered unless (a) it appears that the child has resided with the person or persons petitioning for such adoption for at least six months next preceding the entering of the decree of adoption, except that such residency requirement shall not apply in an adoption of an adult child, (b) the medical histories required by subsection (2) of section 43-107 have been made a part of the court record, and (c) the court record includes an affidavit or affidavits signed by the relinquishing biological parent, or parents if both are available, in which it is affirmed that, pursuant to section 43-106.02, prior to the relinquishment of the child for adoption, the relinquishing parent was, or parents if both are available were, (i) presented a copy or copies of the nonconsent form provided for in section 43-146.06 and (ii) given an explanation of the effects of filing or not filing the nonconsent form. Subdivisions (b) and (c) of this subsection shall only apply when the relinquishment or consent for an adoption is given on or after September 1, 1988.

(2) If the adopted child was born out of wedlock, that fact shall not appear in the decree of adoption.

(3) The court may decree such change of name for the adopted child as the petitioner or petitioners may request.

HISTORY: Laws 1943, c. 104, § 7, p. 351; R.S.1943, § 43-109; Laws 1984, LB 510, § 4; Laws 1985, LB 255, § 22; Laws 1988, LB 372, § 2; Laws 1988, LB 301, § 8; Laws 1989, LB 231, § 2; Laws 1999, LB 594, § 19.

R.R.S. Neb. § 43-111 (2001)

§ 43-111. Decree; effect as to natural parents

Except as provided in section 43-106.01 and the Nebraska Indian Child Welfare Act, after a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child or to his or her property by descent and distribution.

HISTORY: Laws 1943, c. 104, § 9, p. 352; R.S.1943, § 43-111; Laws 1965, c. 234, § 2, p. 679; Laws 1985, LB 255, § 23.

Supreme Court, U.S
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(2)

No. 01-1359

In The

Supreme Court of the United States

LUKE ARMOUR,

Petitioner,

v.

K.D.G. and T.S.G.,

Respondents.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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36P

QUESTIONS PRESENTED FOR REVIEW

1. Does a state statute that allows the adoption of a child born out of wedlock and the automatic termination of the biological father's rights if the father fails to file court action to claim paternity and custody within thirty days of giving notice of his intention to do so deprive such a father of his Fourteenth Amendment rights to due process and equal protection?

2. Did the Nebraska Supreme Court deprive Petitioner of his rights to procedural and substantive due process by holding that he lacked standing to challenge the procedural errors committed by the trial court in the adoption proceedings for his daughter?

PARTIES TO THE PROCEEDINGS

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Though notified of the appeal, the State of Nebraska neither entered an appearance nor participated in the appeal.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents, K.D.G. and T.S.G., adoptive parents of Baby Girl H., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Nebraska Supreme Court's opinion in this case.

OPINIONS AND ORDERS BELOW

The December 12, 2001 order of the Nebraska Supreme Court denying Mr. Armour's motion for rehearing (Pet.'s Appendix A) is unreported.

The November 2, 2001 opinion of the Nebraska Supreme Court, *In re Adoption of Baby Girl H.*, is reported at 262 Neb. 775, 635 N.W.2d 256 (2001). (Pet.'s Appendix B sets forth the initial decision issued by the Nebraska Supreme Court. However, the official version will reflect a correction made by the court following the release of its decision. In the last paragraph and the third to the last paragraph of the decision, the references to the "district" court have been changed to the "county" court.)

The September 21, 2000 decree of adoption entered by the Gosper County Court (Pet.'s Appendix C) is unreported.

The September 15, 2000 order (filed September 20, 2000) entered by the Gosper County Court denying Mr.

Armour further notice in the adoption proceedings (Pet.'s Appendix D) is unreported.

The April 7, 2000 opinion of the Nebraska Supreme Court in a connected case, *Luke Armour v. L.H.* (Pet.'s Appendix E) is reported at 259 Neb. 138, 608 N.W.2d 599 (2000).

STATEMENT OF JURISDICTION

Respondents accept petitioner's jurisdictional statement as set forth on pages 2 through 4 of petitioner's brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents accept petitioner's recitation of the constitutional and statutory provisions as set forth on pages 4 and 5 and Appendix F to petitioner's brief.

STATEMENT OF THE CASE

On April 7, 2000, the Nebraska Supreme Court decided the first appeal of Luke Armour (hereinafter Armour). *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000). (Pet.'s Appendix E) In that case, Armour filed a petition in the District Court for Gosper County, Nebraska for an adjudication of paternity and custody pursuant to NEB. REV. STAT. § 43-104.05 (Reissue 1998). *Id.* 259 Neb. at 139, 608 N.W.2d at 601. On September 22,

1998, the biological mother of Baby Girl H. (hereinafter L.H.) demurred to Armour's petition asserting that the district court lacked subject matter jurisdiction. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 778, 635 N.W.2d 256, 260 (2001). Thus, as of September 22, 1998, Armour was on notice that he was seeking relief in a court without jurisdiction to grant him the relief he sought, including requested visitation rights.

On November 16, 1998, following a determination that it lacked subject matter jurisdiction, the District Court of Gosper County, Nebraska, sustained the demurrer of L.H. and dismissed Armour's petition. *Armour v. L.H.*, 259 Neb. 138, 140, 608 N.W.2d 599, 602 (2000). Rather than file his action in the appropriate court, which was the County Court for Gosper County, Armour elected to appeal the dismissal of his case. On April 7, 2000, the Nebraska Supreme Court affirmed the Gosper County District Court's ruling and dismissed Armour's appeal. *Armour v. L.H.*, 259 Neb. 138, 145, 608 N.W.2d 599, 605 (2000). Armour raised no constitutional arguments in his first appeal. The mandate was issued on May 15, 2000. (Respondents' Appendix A)

Following the dismissal of his appeal and the issuance of the mandate by the Nebraska Supreme Court, Armour did nothing.

Eventually, on July 17, 2000, K.D.G. and T.S.G., filed a petition for the adoption of Baby Girl H. in the County Court for Gosper County, Nebraska. *See* Transcript from the trial court, Record on Appeal to Nebraska Supreme Court at T1-15. They also filed a "Motion for Determination of Notice

Pursuant to NEB. REV. STAT. § 43-104.05 and Notice of Hearing."[1] (T60-62) On July 17, 2000, along with their petition, K.D.G and T.S.G. filed a praecipe requesting the issuance of summons and personal service on Armour of the following: 1) the summons; 2) the petition for adoption; 3) the Motion for Determination of Notice Pursuant to NEB. REV. STAT. § 43-104.05 and Notice of Hearing; and 4) an ex parte order sealing the court file. (T56) On September 15, 2000, the Sheriff of Custer County, Nebraska, filed his return of service with the court showing personal service on Armour on July 19, 2000. (T38-53) Contrary to Armour's assertion in his brief that " . . . [he] could not even obtain a copy of the pleadings" (Petitioner's brief at 8), the record shows he was served with a copy of the petition and the motion for determination of notice. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 778, 635 N.W.2d 256, 261 (2001) ("The record shows that Armour was served with a copy of the petition.")

A hearing on the motion for determination of notice was held in the Gosper County Court on September 15, 2000. *See* Bill of Exceptions from the trial court, Record on Appeal to Nebraska Supreme Court at 7:22; 8:7-9. At the time of the hearing, Armour was 20 years old and was incarcerated. (36:13-20) Armour testified at the hearing that he first learned of L.H.'s pregnancy in June or July of 1998, before the birth of Baby Girl H., although he acknowledged having sexual relations with L.H. in 1997, and admitted L.H. had told him in October of 1997 that she "might" be pregnant. (21:23-25; 22:1-2) (E9,2 and 23-24:19, Vol. II) Shortly after telling him she might be pregnant, L.H. moved to Stratton,

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[1] The full text of NEB. REV. STAT. § 43-104.05 is set forth in Petitioner's brief at Appendix F8-F9.

Nebraska to live with her aunt and uncle. Following L.H.'s move to Stratton, Armour was aware of L.H.'s telephone number and address. He called her on the telephone and wrote her at least one letter. (E9,24:19 Vol. II) L.H. gave birth to Baby Girl H. on July 22, 1998. (22:7-9) In late July, Armour was notified by both L.H. and Lutheran Family Services of the birth of Baby Girl H. (24:13-19) (E9,24:19, Vol. II) (E11,1:25, Vol. II) Exhibit 11 reflects the fact that Armour received a notification letter from Lutheran Family Services on August 3, 1998. (E11,3:25, Vol. II) On August 4, 1998, Armour filed with the Nebraska Department of Health and Human Services (hereinafter "the Department") a Notice of Intent to Claim Paternity and Obtain Custody. (27:3-25; 28:1-4) (E1,1-3:4, Vol. II) The notice signed by Armour on August 4, 1998 provided:

> I understand that if a petition is not filed in the *county* court in the county of residence of said child for an adjudication of my claim of paternity and right to custody *within thirty (30) days* after the filing of this notice, my consent to the adoption of said child shall not be required and any alleged parental rights of mine shall not be recognized thereafter in any court.

(33:19-25; 34:1-17) (E1,2:4, Vol. II) (Emphasis supplied.) Armour testified that he was a high school graduate, that he could read and write the English language, that he signed the Notice of Intent to Claim Paternity and Obtain Custody, and that he understood the foregoing language in the notice. (32:20-25; 33:1-4; 34:1-20; 42:21-23) Armour admits that he did not file a petition in the Gosper County Court within thirty days of signing and filing his notice with the Department. (35:5-8) Further, Armour admits that *at no time* has he ever filed a petition in the county court for adjudication of

his claim of paternity and right to custody of Baby Girl H. (35:9-14) Armour testified that he has never had contact with Baby Girl H. (31:14-16) The record is devoid of any evidence that Armour has contributed financially to medical expenses or other support for either Baby Girl H. or L.H., either before or after the birth of the child. Following the hearing, the trial court ruled that Armour had not complied with the provisions of NEB. REV. STAT. § 43-104.05, and that he was not entitled to any further notice in the adoption proceeding. (Pet's Appendix D)

On September 21, 2000, the petition for adoption of Baby Girl H. came on for hearing. Following the hearing, a decree of adoption was entered. (Pet's Appendix C) Armour again appealed.

In Armour's second appeal, the Nebraska Supreme Court determined that the Nebraska adoption statutes adequately protected Armour's opportunity to form a relationship with his child, but because of his own inaction and his ignorance of the law, he had failed to grasp that opportunity. "The failure to properly follow § 43-104.05 because of ignorance of the law can not be a sufficient reason for criticizing the law itself. . . . Further, after our decision in *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000), Armour failed to make any further attempts to comply with § 43-104.05. As a result, Armour failed to ever file a petition for adjudication of paternity in county court." *In re Adoption of Baby Girl H.*, 262 Neb. 775, 783, 635 N.W.2d 256, 264 (2001).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE NEBRASKA SUPREME COURT'S DECISION THAT NEBRASKA'S STATUTORY ADOPTION SCHEME ADEQUATELY PROTECTED ARMOUR'S OPPORTUNITY TO FORM A RELATIONSHIP WITH HIS CHILD IS CONSISTENT WITH FEDERAL CONSTITUTIONAL PRECEDENT.

A. Where Armour's Only Link to Baby Girl H. is a Potential Relationship, this Court's Focus is on Whether Nebraska's Statutory Scheme Adequately Protects Armour's Opportunity to Form a Relationship With his Child.

Armour claims that Nebraska's statutory scheme relating to the adoption of children born out of wedlock is constitutionally infirm in two respects: 1) the statutes are facially unconstitutional; and 2) the statutes, as applied to Armour, operate to deprive him of his right to due process and equal protection. Armour argues that because NEB. REV. STAT. § 43-104.05 (Reissue 1998) allows for the "automatic termination" of an unwed father's rights if he fails to meet the thirty-day statute of limitations set forth in that statute, it deprives a putative father of a fundamentally fair procedure. In relation to Armour's claim that the adoption statutes, as applied to him, deprive him of due process and equal protection, Armour complains that the thirty-day statute of limitation found in 43-104.05 is simply "too short" and that the adoption statutes treat unwed fathers differently than married fathers without a legitimate state interest for differentiating between them. Armour's claims ignore the realities of this particular case and the constitutional precedent established by both this Court and the Nebraska Supreme Court.

Armour asserts that the "only" reason for requiring a putative father to file a petition in accordance with 43-104.05 is "the apparent sake of expediency in freeing children for adoption." Petitioner's brief at 19. While expediency in adoptions is certainly a legitimate state interest, the Nebraska Supreme Court in *Shoecraft v. Catholic Soc. Servs. Bureau,* 222 Neb. 574, 385 N.W.2d 448 (1986), recognized additional legitimate and compelling state interests. The court noted that "the state has a compelling interest in the well-being of all children, whether born in or out of wedlock, and of their proper nurture and care." *Id.* 222 Neb. at 577, 385 N.W.2d at 451. The court also recognized that "the transfer of children by relinquishment from unwed mothers and the adoption of those children are also compelling state interests . . . " *Id.* Further, the court noted that "a rapid determination of the rights, if any, of an unwed father to object to a relinquishment and subsequent adoption is in the best interests of the child, the relinquishing mother, and of the prospective adoptive parents." *Id.* 222 Neb. at 579, 385 N.W.2d at 452. The court held that "the problems of unwed births and adoptions are legitimate concerns of the Legislature." *Id.* 222 Neb. at 580, 385 N.W.2d at 452. Likewise, the Eighth Circuit found that the State of Nebraska has a legitimate and important interest in establishing a stable environment for adopted children. *Syrovatka v. Erlich,* 608 F.2d 307 (8th Cir. 1979). Those holdings are consistent with those of this Court. *Lehr v. Robertson,* 463 U.S. 248, 265, 103 S. Ct. 2985, 77 L.Ed.2d 614 (1983) (states have legitimate interests "in facilitating the adoption of young children and having the adoption proceeding completed expeditiously").

Recognizing that the state has legitimate and compelling interests in adoptions, a court must determine the nature of

the relationship which is sought to be protected in a case such as this. On this point, courts have distinguished between an unwed father who has an established familial bond with a child and an unwed father who has a mere biological link with a child. While the relationship between parent and child is constitutionally protected regardless of the marital status of the father, the status of an unwed father is readily distinguishable from that of a separated or divorced father and the state can permissibly give an unwed father less veto authority than it provides to a married father. *Quilloin v. Walcott,* 434 U.S. 246, 98 S. Ct. 549, 54 L.Ed.2d 511 (1978). *See also Shoecraft v. Catholic Soc. Servs. Bureau,* 222 Neb. 574, 385 N.W.2d 448 (1986). In addition, this Court has recognized a distinction between the termination of an *opportunity* to form a familial bond with a child and the termination of an *established* familial bond with a child, with different levels of scrutiny afforded to each. *Lehr v. Robertson,* 463 U.S. 248 (1983). *See also In re Application of S.R.S. and M.B.S.,* 225 Neb. 759, 408 N.W.2d 272 (1987) (the mere existence of biological link does not merit equivalent constitutional protection). In *Friehe v. Schaad,* 249 Neb. 825, 545 N.W.2d 740 (1996) and *In re Application of S.R.S. and M.B.S.,* 225 Neb. 759, 408 N.W.2d 272 (1987) the Nebraska Supreme Court held that a distinction exists between the termination of an opportunity to form a familial bond and the termination of an established familial bond, warranting different levels of constitutional protection. In doing so, the court relied extensively on *Lehr* concluding that the proper test in cases such as the one at bar is an intermediate scrutiny test relative to an important governmental objective and substantially related means of obtaining such objective. *Friehe,* 249 Neb. at 833, 545 N.W.2d at 746. Thus, where an unwed father's only

link to a child is a potential relationship, a court's focus is on whether a state's statutory scheme adequately protects his opportunity to form a relationship with the child. *Lehr v. Robertson,* 463 U.S. 248, 262 (1983). In the present case, Armour's link to Baby Girl H. is a mere biological link. Armour does not argue that he has an established familial relationship with Baby Girl H. and the record would not support such a claim. Armour and L.H. were never married and never lived together. (22:3-4) Armour has never had any contact with Baby Girl H. (31:14-16) Rather, Baby Girl H. has at all times since July 29, 1998, been in the care of her adoptive parents, K.D.G. and T.S.G. (58:24-25; 59:1-6) At no time has Armour ever filed a petition to adjudicate his claims to Baby Girl H. in the County Court for Gosper County, Nebraska, as required by 43-104.05. (35:5-14) The record is devoid of any evidence that Armour has contributed financially to medical expenses or other support for either Baby Girl H. or L.H. As noted by the Court in *Lehr,* "[t]he significance of the biological connection is that it offers the natural father an *opportunity* that no other male possesses to develop a relationship with his offspring." *Id.* 463 U.S. at 262. (Emphasis supplied.) Absent a "significant custodial, personal, or financial relationship" with the child, a court's only concern is whether the state has adequately protected the natural father's opportunity to form such a relationship. *Id.* 463 U.S. at 263.

B. Nebraska's Statutory Scheme Relating to the Adoption of Children Born Out of Wedlock Adequately Protects a Putative Father's Opportunity to Form a Relationship With his Offspring.

The Due Process Clause of the Fourteenth Amendment requires that an unwed father be provided adequate notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). *See also Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). In July and August of 1998, Nebraska's statutory adoption scheme provided that notice be given to seven categories of putative fathers. NEB. REV. STAT. § 43-104.12 (Reissue 1998). (Pet's Appendix F13-14) Armour fell under two of the seven categories: §§ 43-104.12(5) and 43-104.12(7). Thus, notice to Armour was mandated by law.

NEBRASKA REVISED STATUTE § 43-104.13 (Reissue 1998) sets forth the information which must be provided to putative fathers such as Armour. (Pet's Appendix F14-15) Two of the provisions of that statute are particularly relevant to this case. Pursuant to § 43-104.13(5)(d), a putative father must be told that he has a right to "file a notice of intent to claim paternity and obtain custody of the child pursuant to section 43-104.02." Additionally, pursuant to § 43-104.13(6), a putative father must be told that "if he wishes to seek custody of the child he should seek legal counsel from his own attorney immediately." Armour testified that Exhibit 11 is the actual letter he received from Lutheran Family Services. (26:7-13) Exhibit 11 specifically notified Armour that he had certain rights, including the right to "[f]ile a notice of intent to claim paternity and obtain custody of the child." (E11,1:25, Vol. II) Exhibit 11 further notified Armour:

> If you wish to establish your rights as the biological father of the child, you must file a notice with the biological father registry maintained by the Nebraska Department of Health and Human Services. Such a notice must be on a special form provided by the Department and must be filed *no later* than five business days after the birth of the child or your receipt of this letter, whichever is later. If you wish to pursue custody of this child, you should seek counsel from your own attorney immediately.

(E11,1:25, Vol. II) (Emphasis in original.)

The letter sent to Armour by Lutheran Family Services clearly complies with the notice requirements found in 43-104.13. Indeed, the letter specifically directed him to file a "special form" with the Department within five business days of his receipt of the letter. Armour testified that upon receiving the letter he did so. (27:3-25; 28:1-4) Armour identified Exhibit 1 as a certified copy of the notice he filed with the Department on August 4, 1998. (33:19-25) Exhibit 1 provided:

> I understand that if a petition is not filed in the *county* court in the County of residence of said child for an adjudication of my claim of paternity and right to custody *within thirty (30) days after the filing of this notice,* my consent to the adoption of said child shall not be required and any alleged parental rights of mine shall not be recognized thereafter in any court.

(E1,1:4, Vol. II) (Emphasis supplied.) The foregoing language in the notice was consistent with the language found in NEB. REV. STAT. § 43-104.05 (Reissue 1998), and was a correct statement of the law on August 4, 1998. *See Armour v. L.H.,*

259 Neb. 138, 608 N.W.2d 599 (2000). Therefore, as of August 4, 1998, at the very latest, Armour was on notice as to what he needed to do in order to protect his opportunity to form a relationship with Baby Girl H. Armour complains that if a putative father misses the thirty-day filing deadline he is presumed to be unfit and the statute operates to "automatically terminate" his parental rights without requiring proof of "anything" and as such is fundamentally unfair. He also claims that the thirty-day deadline does not afford a putative father sufficient time to establish a relationship with his child. (Petitioner's brief at 18-20) Armour's argument completely overlooks the facts of this case. In fact, he *did* file his notice with the Department within five business days, and he *did* file a petition within 30 days of filing his notice. (E1,1-3:4, Vol. II) (E9,2-4:19, Vol. II) However, he filed his petition in the *wrong* court. *Armour, supra.* Had he filed his petition in the proper court, he would have been entitled to a hearing "not less than twenty nor more than thirty days" after such filing. NEB. REV. STAT. § 43-104.05. At that hearing, pursuant to § 43-104.22, the trial court's focus would have been twofold: 1) whether Armour was actually the father of the child; and 2) whether Armour was a fit, proper and suitable custodial parent for the child.[2]

Both this Court and the Nebraska Supreme Court have held that a putative father's ignorance of the law will not relieve him of his obligation to follow the law. *See Lehr v. Robertson,* 463 U.S. 248, 264 (1983) (the possibility that the

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[2] The full text of 43-104.22 is set forth at Pet.'s Appendix F20-22. No such hearing has ever been held because Armour failed to file his petition in the proper court, either within the 30-day time frame or any time thereafter.

putative father may have failed to follow the law because of his ignorance of the law cannot be sufficient reason for criticizing the law itself); *Shoecraft v. Catholic Soc. Servs. Bureau*, 222 Neb. 574, 580, 385 N.W.2d 448 (1986) (putative fathers, like all citizens, are presumed to know the law; statutes of limitation bar evenly the claims of the wary and the unwary, the just and the unjust).

Armour's arguments also overlook the fact that this Court has held that legitimate state interests justify requiring an unwed father to "adhere precisely" to the procedural requirements of the statutes which afford him the opportunity to assert any alleged claims he may have to his child.

> The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.

Lehr, supra, 463 U.S. at 265. In the case at bar, legitimate state interests justify requiring Armour to adhere precisely to the procedural requirements of 43-104.05. Armour received adequate notice, he filed the proper form with the Department, and he filed a petition, albeit in the wrong court. It was not an *inability* to comply with 43-104.05 that created the problem, it was ignorance of the law. Additionally, it is noteworthy that Armour has yet to offer any explanation as to why he has never filed a petition in the Gosper County Court despite the fact that as of the September 15, 2000 hearing he

had had over two years to do so. Consequently, Armour's claim that 43-104.05 "automatically terminated" his parental rights is simply not supported by the record. Further, Armour's assertion that 43-104.05 allows the trial courts no discretion in applying the law or in providing notice to putative fathers overlooks both § 43-103[3] and pertinent Nebraska jurisprudence.[4]

C. The Thirty-Day Filing Requirement Found in § 43-104.05 Furthers Important Nebraska Objectives and is a Logical Extension of *Lehr*.

Armour asserts that the Supreme Court in *Lehr* "did not condone" a thirty-day filing deadline such as the one found in 43-104.05. Petitioner's brief at 18. However, *Lehr* does not preclude such a statutory provision. The thirty-day provision does nothing more than require the natural father to follow through on his stated intent to claim paternity and request custody. Without such a requirement, the child, the natural mother and the prospective adoptive parents are left in limbo indefinitely. The child either cannot be placed for

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[3] The full text of 43-103 is set forth at Petitioner's Appendix F3, but provides in relevant part: "The court may require notice of the [adoption] hearing to be given . . . to the parent or parents of the child, and to such other interested persons as the judge may, in the exercise of discretion, deem advisable . . . "

[4] Armour's claim that 43-104.05 automatically terminates the parental rights of any father of a child born out of wedlock, even if a father "has had contact with the child, established a familial relationship, and financially supported the child", ignores Nebraska case law to the contrary. *See In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987) and cases cited therein.

adoption or, if placed, runs the risk of having that placement disrupted. The right to seek and obtain the hearing he now requests was completely within Armour's control. That he may have failed to do so because of his ignorance of the law is not sufficient reason for criticizing the law itself. *Lehr v. Robertson,* 463 U.S. at 264.

D. Nebraska's Distinction Between Unwed Fathers Whose Children are Being Placed for Adoption and Unwed Fathers Whose Children are Not Being Placed for Adoption Serves a Legitimate State Interest and Does Not Run Afoul of the Equal Protection Clause of the Fourteenth Amendment.

Armour premises his equal protection argument on the assertion that Nebraska adoption statutes impermissibly draw a distinction between married fathers and unmarried fathers, and that such distinction does not pertain to a substantial or important governmental interest. Petitioner's brief at 22. In actuality, the distinction drawn by Nebraska statutes is one between unwed fathers whose children are being placed for adoption and unwed fathers whose children are not being placed for adoption. NEB. REV. STAT. § 43-104.05. NEB. REV. STAT. § 43-1411. The need for the distinction is obvious. When the natural mother of a child born out of wedlock decides to place her child for adoption, important and legitimate governmental interests come into play and must be balanced against the natural father's constitutionally protected rights. The interests of the natural mother, the child and the prospective adoptive parents must also be taken into consideration. The Nebraska Legislature has

enacted two different statutory schemes in order to protect the interests involved and to achieve the balance sought.

Once a natural mother decides to place her child for adoption, the natural father is notified of the mother's decision and 43-104.05 sets forth the procedural steps the father must take to assert any alleged rights he may have to the child. If the father complies with the five-day and thirty-day deadlines in 43-104.05, he will be afforded a hearing on paternity and fitness pursuant to 43-104.22. That is true regardless of the age of the child at the time the mother decides to place the child for adoption. The five-day deadline does not begin to run until the birth of the child or the father's notification of the impending adoption "whichever is later." NEB. REV. STAT. § 43-104.02 (Pet's Appendix F6). Following the filing of his notice of intent to claim paternity and obtain custody, the father must file his petition for paternity and custody within thirty days. NEB. REV. STAT. § 43-104.05. He then is entitled to his hearing on paternity and fitness.

In cases where an unwed mother elects to keep and raise her child, the natural father's right to assert his claims to paternity and custody are governed by NEB. REV. STAT. § 43-1411 (Reissue 1998). (Respondents' Appendix B). That statute allows (in cases other than adoption) four years for either parent to petition the court for a determination of paternity and custody. Thereafter, the child, by and through a guardian or next friend, can petition the court for a determination of paternity and custody until the child's eighteenth birthday. The more stringent time frames set forth in 43-104.05 are not implicated until and unless the natural mother decides to place the child for adoption. These two statutory schemes address the necessary distinction between

two classes of unwed fathers and further important governmental interests. The more stringent time frames found in 43-104.05 serve an important purpose in cases where the child is being placed for adoption and are necessary to achieve expediency, security and finality in adoptions, factors not present in cases where the child is not being placed for adoption.

II. THE NEBRASKA SUPREME COURT CORRECTLY DETERMINED THAT ARMOUR DOES NOT HAVE STANDING TO ASSERT THE RIGHTS OF REAL OR IMAGINED THIRD PARTIES, AND DOES NOT HAVE STANDING TO INVOKE THE COURT'S REMEDIAL POWERS CONCERNING HYPOTHETICAL OR FICTITIOUS ISSUES.

In his brief submitted in the Nebraska Supreme Court, Armour repeatedly attempted to assert the rights of third parties. For instance, he attempted to assert what he apparently perceives as L.H.'s right to invalidate her consent and relinquishment (Armour's Nebraska Supreme Court brief at 15); Baby Girl H.'s "right" to her medical history (Armour's Neb. Sup. Ct. brief at 19-20); what he perceives as Baby Girl H.'s "right" to require an updated home study consistent with Armour's interpretation of the "purpose" of NEB. REV. STAT. 43-107 (Armour's Neb. Sup. Ct. brief at 22-23); Baby Girl H.'s "right" to have a guardian or guardian ad litem sign a substitute consent in lieu of Armour's consent to adoption (Armour's Neb. Sup. Ct. brief at 23-25); the rights of a hypothetical comatose putative father (Armour's Neb. Sup. Ct. brief at 31-32); the rights of a hypothetical putative father facing hypothetical castration (Armour's Neb. Sup. Ct. brief at 32); the rights of a hypothetical single woman facing

a hypothetical forced abortion (Armour's Neb. Sup. Ct. brief at 32); the rights of a hypothetical putative father who did not meet the thirty-day deadline in 43-104.05 for a variety of hypothetical reasons (Armour's Neb. Sup. Ct. brief at 32-33); the rights of a hypothetical putative father who did not know the county in which to file his petition (Armour's Neb. Sup. Ct. brief at 33); the rights of a hypothetical putative father who did not receive notice under 43-104.13 as Armour believes the statute *should be* written (Armour's Neb. Sup. Ct. brief at 34); and so on. *Those* were the assertions and legal arguments to which the Nebraska Supreme Court responded in its decision of November 2, 2001 pertaining to the issue of standing. In his petition to this Court, Armour frames the issue differently and claims that he should have been given notice and an opportunity to be heard at the adoption hearing, and that had he been given notice he would have appeared and objected to what he alleges were errors made by the trial judge at that hearing. Petitioner's brief at 22. Although his claims have been refined and restated in his petition to this Court, the legal analysis does not change. The Nebraska Supreme Court held:

> In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties. [Internal citations ommitted.] The issues regarding the final adoption hearing and decree arose out of proceedings that Armour was not a party to and not required to be given notice of. Armour is attempting to assert the legal interests of third parties. Because Armour lacks standing, we do not address his remaining assignments of error.

In re Adoption of Baby Girl H., 262 Neb. 775, 787, 635 N.W.2d 256, 266 (2001).

The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 2301-2302, 124 L.Ed.2d 586 (1993). *See also Miller v. City of Omaha*, 260 Neb. 507, 518, 618 N.W.2d 628 (2000). Here, Armour is not situated the same as the individuals in the foregoing hypothetical situations. He would not benefit from a more complete medical history from L.H., or a completed and signed medical history from himself. Further, Armour is not in a coma, nor is he facing castration or a forced abortion. Standing requires that a litigant have such a *personal* stake in the outcome of the controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Orr v. Orr*, 440 U.S. 268, 291, 99 S. Ct. 1102, 1118, 59 L.Ed.2d 306 (1979); *Miller, supra*, 260 Neb. at 518. In order to have standing, Armour must assert his own legal rights and interests; he cannot rest his claims on the legal rights or interests of third parties. *Id.* In addition, Armour must argue the facts of his own case. An actual case or controversy is necessary for the exercise of judicial power. *Prieser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 2334, 45 L.Ed.2d 272 (1975); see also *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 460, 598 N.W.2d 729 (1999). A court does not offer advisory opinions but decides real controversies and determines rights actually controverted. A court does not address or dispose of abstract questions or issues that might arise in a hypothetical or

fictitious situation. *Northeastern Florida Chapter of the Associated General Contractors of America, supra,* 508 U.S. at 663, 113 S. Ct. at 2302. See also, *In re Interest of Kantril P. & Chenelle P., supra,* 257 Neb. at 460. Contrary to Armour's assertions, his presence or absence at the adoption hearing, for purposes of raising these claimed errors, was irrelevant. He cannot assert the rights of third parties, period. *See Craig v. Boren,* 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976).

Finally, even if the Court were inclined to review the claims set forth on page 22 of Armour's brief, many of Armour's complaints can be disposed of by recognizing that the standard applicable to a Nebraska court's determination of compliance with sections 43-104.08 through 43-104.16 is not strict compliance, it is substantial compliance, and a trial court may properly enter a decree of adoption in Nebraska so long as there is substantial compliance with said sections. *See* NEB. REV. STAT. §§ 43-104.18 and 43-104.23 (Reissue 1998).[5]

Further, at least some of Armour's assertions regarding alleged errors committed by the trial judge border on frivolous. For instance, Armour argued in the Nebraska Supreme Court, and now in this Court, that the trial judge impermissibly conducted the adoption hearing more than four weeks after the filing of the petition for adoption. Petitioner's brief at 22. NEBRASKA REVISED STATUTE § 43-103 does not require that the petition be heard within four weeks.[6] If Armour is

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[5] The full text of 43-104.18 is set forth at Petitioner's Appendix F19-20. The full text of 43-104.23 can be found at Respondents' Appendix C.

[6] The full text of 43-103 is set forth at Petitioner's Appendix F3. It requires a court to hear a petition *not less than four nor more than eight weeks* after filing.

asserting that the trial court heard the petition beyond the eight-week time frame set forth in 43-103 he has neglected to point out that it was due to *his* request for an extension of time to allow his attorney to prepare for the September 15, 2000 hearing which was four days beyond the eight-week time frame. (7:22; 8:7-9) The hearing on the adoption petition was held six days later on September 21, 2000. (Pet's Appendix C). Finally, Armour *benefited* from the ten-day extension, and it in no way undermined any of the procedural or substantive rights to which he claims to be entitled. It is well established in Nebraska that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about. *Missouri P. R. v. Fox*, 60 Neb. 531, 83 N.W. 744 (1900), *overruled in part on other grounds, Callahan v. Prewitt*, 143 Neb. 787, 800, 13 N.W.2d 660, 663 (1944). The statutory errors that Armour claims were made by the trial judge at the adoption hearing are purely matters of state law and, thus, do not merit the invocation of this Court's jurisdiction.

III. AMONG THE STATES WHICH HAVE ADDRESSED SIMILAR SITUATIONS SINCE *LEHR*, COURTS HAVE CONSISTENTLY AFFORDED UNWED FATHERS DUE PROCESS AND EQUAL PROTECTION IN ACCORDANCE WITH FEDERAL PRECEDENT.

Armour asserts that state courts of last resort have handed down conflicting decisions regarding the constitutionality of state statutes that permit the adoption of children born out of wedlock. Petitioner's brief at 28. However, a close review of the decisional law set forth by Armour on

page 29 of his brief reveals adherence by the courts with federal constitutional precedent as enunciated by this Court. In each instance, the court analyzed the statute(s) in question, the specific facts of the case and the constitutional rights implicated. Some of the questioned statutes were held unconstitutional while others were upheld as constitutional. That fact does not render those cases inconsistent with the Nebraska Supreme Court's holding in *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), nor does it create a "conflict" among the courts of last resort in this country. To the contrary, those decisions show consistency across the nation in interpreting and applying pertinent federal constitutional law.

CONCLUSION

The Nebraska statutory adoption scheme is both facially constitutional, and constitutional as it was applied to Armour in this case.

The State of Nebraska has legitimate and compelling interests in the well being and the nurture and care of all children in Nebraska. The statutory provisions requiring a putative father to file a notice with the Department within five days and a petition in the county court within thirty days bear a direct relation to important governmental objectives. This case presents a stark example of the precise need for requiring putative fathers such as Armour to comply precisely with 43-104.05. Without the thirty-day filing requirement, Armour could file his five-day notice of intent and then elect to do nothing, leaving L.H. and Baby Girl H. in limbo indefinitely. The thirty-day requirement is a logical

extension of *Lehr* and affords putative fathers ample time to request a hearing on paternity and fitness in the proper court. His failure to do so was the result of his ignorance of the law and his subsequent inaction. Baby Girl H. is now three and one-half years old. Had Armour complied with the provisions of 43-104.05, a determination of his paternity and right to custody would have been made before she was three months old. The ability to comply with 43-104.05 was at all times within Armour's control. Section 43-104.05 is a reasonable, indeed necessary, means of accomplishing stability and certainty in adoptive relationships. K.D.G. and T.S.G. urge this court to deny Armour's petition for writ of certiorari.

Respectfully submitted,

K.D.G. and T.S.G., Respondents

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APPENDIX A

Date: May 15, 2000

(Filed May 16, 2000)

NEBRASKA SUPREME COURT

To: Gosper County District Court, Nebraska

WHEREAS, in a late action in your court, captioned:

Armour v. Huffman

you rendered judgment.

And, **WHEREAS**, the petitioner, Luke Armour prosecuted an appeal to this court.

ON CONSIDERATION WHEREOF, the appeal from the judgment which you rendered has been dismissed

by the Supreme Court.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

Costs of this appeal are to be paid by appellant and are taxed at $52.00.

WITNESS the Honorable John V. Hendry, Chief Justice, and the seal of this court.

[SEAL]

Lanet S. Asmussen
Clerk of the Supreme Court

/s/ Jan Culver
Deputy Clerk

Supreme Court No.

S-98-1232

Trial Tribunal No.

3591

Date Opinion Issued

04/07/00

COSTS IN THE SUPREME COURT

Cost Due Clerk Supreme Court	$ -0-
Paid by District Court Clerk	$50.00
Legal Srvs. fee paid	$ 2.00
Total Costs	$52.00

Costs should be distributed in accordance with Neb. Rev. Stat. § 25-1915.

APPENDIX B

43-1411. Paternity; action to establish; venue; limitation; summons. A civil proceeding to establish the paternity of a child may be instituted, in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, by (1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth, unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption or (2) the guardian or next friend of such child or the state, either during pregnancy or within eighteen years after the child's birth. Summons shall issue and be served as in other civil proceedings, except that such summons may be directed to the sheriff of any county in the state and may be served in any county.

Source: Laws 1941, c. 81, § 11, p. 325; C.S.Supp., 1941, § 43-711; R.S.1943, § 43-1411; R.S.1943, (1983), § 13-111; Laws 1985, Second Spec. Sess., LB7, § 75; Laws 1986, LB813, § 1; Laws 1991, LB457, § 16; Laws 1993, LB 500, § 54; Laws 1994, LB1224, § 59; Laws 1995, LB712, § 29; Laws 1998, LB1041, § 45. Operative date July 1, 1998.

APPENDIX C

43-104.23. Child born out of wedlock; order finalizing adoption without biological father's notification; when; appeal. If, after viewing the evidence submitted to support a petition to finalize an adoption or any evidence submitted by a guardian ad litem if one is appointed, the court determines that no biological father can be identified, or that no identified father can be notified without likely threat to the safety of the biological mother or the child, or upon a finding of due diligence and substantial compliance with sections 43-104.08 to 43-104.16 and a finding that no biological father has timely filed under section 43-104.02, the court shall enter an order finalizing the adoption of the child. Subject to the disposition of an appeal, upon the expiration of thirty days after an order is issued under this section, the order shall not be reversed, vacated, or modified in any manner or upon any ground including fraud, misrepresentation, or failure to provide notice under sections 43-104.12 to 43-104.14.

Source: Laws 1995, LB712, § 16.